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Supreme Court of the United States

OCTOBER TERM, 1954

No. 530

LEROY SMALLS, CHARLES BRIGHT AND EVA G. MITCHEL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN MITCHEL, DECEASED, PETITIONERS,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENT

PETITION OF RESPONDENTS FOR REHEARING OF ORDER GRANTING CERTIORARI AND REVERSING JUDGMENT

AND

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND IN OPPOSITION TO GRANT WRIT OF CERTIORARI

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PETITION OF RESPONDENT FOR REHEARING OF ORDER GRANTING CERTIORARI AND REVERSING DECISION AND JUDGMENT

The petitioner, Atlantic Coast Line Railroad Company, prays that the order of 28 February, 1955, be vacated and that the writ of certiorari be dismissed and the petition therefor denied, or in the alternative, that the order of 28 February, 1955, be modified to permit the case to be assigned for argument. (For convenience and clarity we shall avoid using, as far as possible, the term petitioner and shall refer to the Atlantic Coast Line Railroad Company as "defendant" and to the parties plaintiff as "plaintiffs".)

GROUNDS FOR SEEKING REHEARING AND DISMISSING THE WRIT AND REVERSING THE DECISION

I

In granting the petition for certiorari this Court did not have before it grounds and supporting evidence appropriate for the granting of the writ in conformity with the rules and procedures formulated by this Court in that the grounds of the petition and its presentation of supporting facts were inadequate and its conclusions unjustified to warrant reversal.

II

In summarily reversing the judgment of the Court of Appeals of the Fourth Circuit, this Court has precluded the petitioner from presenting substantial evidence and argument that the decision of the Court of Appeals correctly construed the facts and applied and followed the controlling interpretations of the Federal Employer's Liability Act, as declared by this Court.

III

In granting the petition for certiorari and ordering a reversal of the judgment, this Court disregarded its repeated and uniform rulings that the Federal Employer's Liability Act does not make a railroad company an insurer of the safety of its employees.

IV

The granting of the petition for certiorari and the decision of reversal for the judgment were improvidently allowed and insufficiently supported by the evidence relied on in the petition, or any evidence whatever furnished in connection with such petition:

(a) In that the evidence relied on was made up of three separate excerpts from the testimony of the plaintiff, Bright, selected out of context from his full testimony which

contradicts the validity of the conclusions drawn from such random excerpts in support of that petition.

(b) In that the supporting facts, based upon the evidence quoted in the petition, pertain solely to plaintiff Bright's statements of what was said to him by defendant's Section Master Hill, under whom Bright worked as a section hand. Whereas such showing and the conclusions drawn therefrom, even if true and sound, were not applicable to the causes of plaintiffs LeRoy Smalls and of the estate of Benjamin Mitchel, deceased, since Smalls and Mitchel had no connection whatever with Section Master Hill, but were engaged in a separate and distinct group of section laborers who worked solely under Section Master Mitchum. In other words, Bright was a laborer on the Jacksonboro group, under Hill; the other two plaintiffs were members of the Adams run group, under the direction of Mitchum. The causes of two of the three plaintiffs were not affected by the evidence relied on in the petition for certiorari.

V

In that the failure of counsel for the defendant to file a brief, under Rule 24 of this Court, in opposition to the petition for certiorari was not unwarranted for reasons that will be elaborated in the argument annexed to this petition for rehearing.

PRAYER

On the grounds set forth above, it is respectfully prayed that a re-hearing be granted and that upon such re-hearing the writ of certiorari to the Court of Appeals for the Fourth Circuit be dismissed and the petition therefor denied, or in the alternative that the order of 28 February, 1955 be modified to permit the case to be assigned for argument.

Respectfully submitted,

DOUGLAS McKAY,
Columbia, South Carolina,
Attorney for Atlantic Coast Line Railroad Company.

Of Counsel:
McKAY & McKAY,
Attorneys at Law,
Columbia, South Carolina.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is in compliance with Rule 58 (1) of the Rules of this Court.

DOUGLAS McKAY.

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND IN OPPOSITION TO THE GRANTING OF CERTIORARI AND TO THE RENDITION OF DECISION REVERSING JUDGMENT HEREIN

At the outset we quote the order of this Court granting certiorari and its decision of reversal, dated 28 February, 1955. (omitting caption):

> "Per Curiam; The petition for writ of certiorari is granted and the judgment is reversed.
>
> Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Minton dissent."

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit has not yet been reported but will be found in the Appendix to this brief and argument, following the "Proceedings" which embrace all the testimony before that Court.

JURISDICTION

Since this Court has taken jurisdiction of the matter herein it is hardly necessary to do more than state that this petition for rehearing is brought in connection with Revised Rules of the Supreme Court, 58 (1).

QUESTION PRESENTED

Is there in the present case any evidence of defendant's actionable negligence which, as a proximate cause, contributed to plaintiffs' injuries other than mere guess, speculation, theory, conjecture, possibility or surmise upon which a jury determination should be had?

CONSTITUTIONAL PROVISION, STATUTE OR REGULATION

The Federal Employer's Liability Act governs in this case.

STATEMENT

This is a consolidation of three cases, arising out of the same occurrence. One of the plaintiffs was killed, two seriously injured. They were colored track laborers of the railroad company, waiting in early morning darkness to board a train of the Atlantic Coast Line Railroad Company which, by pre-arrangement, was to stop for them at a flag-stop station, Jacksonboro, South Carolina. They had nothing to do except catch the train to go to a Safety Meeting, at Florence, South Carolina. Unfortunately they stopped in an highway that crossed the railroad tracks approximately two hundred yards from the freight station at Jacksonboro, S. C. They were free to wait at any place within this distance, but elected to gather in the eighteen foot space of the highway crossing, over which the railroad had no control and where, of course, occasional motor vehicles might be expected. There was no evidence this highway was greatly travelled and it was not paved on the portion where they waited. They were struck by an automobile, driven by a reckless, lawless, colored driver who had no connection in any way with the railroad company, with the results above noted.

We do not accept as correct, fair or impartial, the statement contained in the petition for certiorari. (Petition, page 5.)

Not only shall we point out serious omissions of fact and unsupported and false conclusions in the statement but we shall further indicate a number of such instances in the **Reasons** the plaintiffs give for granting the writ and in plaintiffs' **Petition for Rehearing** presented to the Court below, which is filed in the Appendix to support the petition for certiorari. We shall clear away these cobwebs over the face of the facts under our following treatment, designated:

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DISCUSSION OF FACTS

The plaintiffs were section laborers for the Atlantic Coast Line Railroad Company and belonged to two separate sets, or groups, of men working on different sectors of tracks. Bright was a laborer on the Jacksonboro section, under the supervision of Section Master Hill. Smalls and Mitchel were employed on the Adams run group, under Section Master Mitchum. These men and their co-laborers, several days ahead of time, were invited to attend a Safety Meeting to be held on Saturday, 28 March, in the City of Florence, South Carolina. (Incidentally, Bright states that the invitation was extended about two weeks ahead. This is unimportant, but he is probably mistaken about the time.) The flag-stop station, Jacksonboro, was a convenient place for embarkation of both crews. The 28th March was a Saturday and the men did not work on Saturday for that was a non-work day, and no pay was received for their attendance on the Safety Meeting. There was no obligation, or requirement to attend this meeting, and the plaintiff Bright was the only witness of the whole group who stated that he was told by Mr. Hill that he had to go. He, however, received the notice of the meeting along with his other co-laborers, none of whom would testify that there was any compulsion of any kind to attend. All the other witnesses, co-laborers with Bright, Albert Danner (Appendix Proceedings, p. 6) John Washington, (p. 99) Jim Green (p. 102) and Herman Miller (p. 105) who were notified along with him concerning the meeting, testified that they could go if they pleased and that there was no compulsion. These witnesses corroborated Mr. Hill that attendance was voluntary (p. 76). Depositions of these men, with the exception of Danner and Hill who testified at the trial, were taken by the attorneys for the plaintiffs, but they did not offer the depositions in evidence on the trial of the case, so the defendant did.

In the same category were the depositions taken by the plaintiffs, but offered by the defendant, of Henry Gibbs (p. 96) and Clinton Wright (p. 108). Jeff Nesbitt (p. 62) testified on trial for the defendant. Each of these witnesses, employed under Section Master Mitchum, stated there was no compulsion whatever in the matter of attending the Safety Meeting.

We point out this fact of voluntary attendance in order to clarify an understanding of the testimony. On the trial of the case, the writer of this argument was of the opinion that if attendance upon the Safety Meeting was merely by invitation, or request, and that no remuneration of any kind was paid to those who did attend voluntarily, the relationship of employer and employee on such occasion did not come within the purview of the Federal Employer's Liability Act. Both the trial Court and the Court of Appeals for the Fourth Circuit overruled this contention, however, and though the Attorney for the defendant still maintains the contention was meritorious, it is referred to at this time merely to clarify the evidence, particularly that of Bright upon whom the petitioner for certiorari entirely relies.

To support the contention that the plaintiffs here were ordered to be and wait **at the Highway crossing**, the petitioner for certiorari cites the following from Bright's testimony; (Petition for Certiorari, Appendix p. 12, taken from page 46 of the defendant's Appendix of evidence.)

> "Q. On the 28th. And Charles, didn't Mr. Hill, your foreman, tell you they would like for you to go but you didn't have to go?
>
> A. He told me to be at the crossing.
>
> Q. He told you you had to go.
>
> A. Yes sir."

This testimony in itself, taken in connection with the context of the entire testimony, indicates only that the witness meant that he had to go to the meeting. It had noth-

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ing to do with the contention that he was directed to wait at the Highway crossing of the railroad right-of-way. It is this testimony that petitioners for certiorari rely on to induce this Court that there was a question of fact for the jury that these men were directed to wait **in the highway crossing**. At page 50, the same witness Bright clarifies what he understood as to where he was to go to catch the train.

"Q. (By Mr. McKay) You were told to meet that train at Jacksonboro weren't you?

A. Yes sir."

Then he states that he stood up at the crossing where others of his fellows had gathered, then resuming the examination we find:

"Q. Nobody told you to stand in the railroad crossing?

A. No sir. Nobody told us to."

The only conclusion to be drawn from this man's testimony is that he was free to stand anywhere he chose between the road and the old freight station, but that he stood at the crossing because others of his fellows were waiting there. The record, as a whole, shows unequivocally that the men could have taken up their place of waiting anywhere within **two hundred yards**, the distance between the **six yards** wide highway crossing and the freight station. From any point in this area when the train would stop to take them on, they could proceed to the coach where the Conductor would open the vestibule to let them get aboard.

The foregoing shows conclusively that there is no foundation for the inclusion in the petition for certiorari, under **Question Presented**, that the employer had sent the employees to wait for a train on a highway, nor for the observation, under the heading of **Statement**: "That they were sent by the railroad on a dark night to wait for a

train **on an unlighted, travelled highway crossing the train tracks.**" The same false statement also appears on page 4 of the petition, under the heading of **Reasons for Granting the Writ.** Note again, on page 12, under the heading of **Petition for Rehearing,** the same unfounded statement that the testimony hereinbefore referred to and quoted herein refutes the finding of the Court of Appeals for the Fourth Circuit.

Thus, upon the basis of a mere chance phrase, used by Bright in asserting that he was required to attend the Safety Meeting at Florence, "**to be at the crossing**" the petitioners for certiorari base their case, overlooking that when asked if he was told to stand in the railroad crossing he had answered, "**No sir. Nobody told me to.**" There can be no inference from the testimony of the witness Bright that the employees were told to meet and wait **at the highway crossing.** None of the witnesses whose depositions were taken by the plaintiffs—and on their behalf—testified to any such thing, and the only inference to be drawn from the entire testimony was that the employees were told that if they wished to go to the meeting at Florence, they should come to Jacksonboro where the train would be stopped to take them aboard.

We submit the Court of Appeals for the Fourth Circuit could have found not only that there was no negligence on the part of the Atlantic Coast Line Railroad Company, but that those who were injured in the collision with the third party's car on the highway crossing, in selecting the only dangerous spot within the area of two hundred yards, were guilty of sole negligence in picking out an eighteen foot public road instead **of waiting safely and conveniently anywhere else on the railroad's right-of-way.**

We might further state at this point that the only inference to be drawn from the case is that the highway in question was indeed a secondary highway. The car that

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caused the injuries approached over an unpaved section of road and the highway itself was paved only from the far side of the railroad tracks, beyond where the victims were struck by the lawless driving of the automobile.

It, of course, must be conceded that Jacksonboro is a flag stop, where no passenger trains stop unless flagged, or notified in advance take on passengers; and there are no lights anywhere there, as is the case in hundreds of other flag stops on the line of the defendant, and of other railroads in this country.

There is one other false and unwarranted statement on page 13, under the Heading of **Petition for Rehearing:**

"Certainly the foreman of the defendant company who was present at the crossing and saw the appellees standing in the roadway knew, or should have been aware of these conditions which would likely cause appellees to be struck just as they were struck by the automobile of the third person and the railroad failed in its duty to make reasonable provision against this."

There is not a word of testimony in this case that in the darkness of the early morning, of 28th March, around four o'clock, Section Master Hill was at the crossing, or could see or have knowledge that a group of these men had gathered at a point at least two hundred yards distant from where he was when the accident occurred. (See Hill's testimony, page 76, Appendix, under the heading of **Proceedings.**) Plaintiffs' witness, Highway Patrolman Grooms, who reached the place sometime after the accident testified that it was dark when he got there (p. 26).

ARGUMENT

Certiorari Should Not Have Been Granted.

What we have said hereinabove applies directly to this position for there is nothing in the full evidence in this case to support the granting of certiorari.

This Court has declared on numerous occasions that the granting of the writ is not warranted merely to review the evidence or inferences drawn from it, or to discuss specific facts. *General Talking Pictures Corporation v. Western Electric Co.*, 304 U. S. 175, 178; *United States v. Johnson*, 368 U. S. 220, 227; *Southern Power Company v. North Carolina Public Service Co.*, 263 U. S. 508, 509; *Houston Oil Co. of Texas v. Goodrich*, 245 U. S. 440; *New York Central & Hartford R. R. Co. v. Kinney*, 260 U. S. 340, 345.

Since the order of this Court sought to be reviewed on rehearing does not cite authorities, or set forth the reasons for granting certiorari, it is not an unwarranted assumption that the Court in granting certiorari has either undertaken to review the facts in the light of the applicant's limited and biased statement of the case, or that it has granted certiorari because our procedural failure to file a brief in opposition to the certiorari petition indicated an acquiescence in plaintiffs' contention. We shall refer to the latter assumption later.

When we consider the vast preponderance in number of applications for certiorari denied over those granted, we can but come to the conclusion that as a rule the Court must find something of considerable importance to grant a petition for certiorari, particularly in the face of a well considered opinion by an able Court of Appeals. The fact that Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Minton dissented obviously indicated that three of the Justices of this Court disapproved of the allowance of the writ and of the order and decision thereon. We cannot but conclude that the other members of the Court who concurred in the

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order must have been misled by the statement of facts in support the question presented as set forth in the petition for certiorari.

The decision complained of implies an interpretation of the Federal Employer's Liability Act that the duty of a railroad company to exercise reasonable care to furnish a safe place to work extends to lighting its right of way, or premises, at a flag stop, where employees are supposed to board a train to go to the place of work because they must, or should be, protected from possible violence and injury by reckless automobile driving by some criminal minded or wilful third party. In view of the impact of this momentous decision on hundreds of cases under that act pending today in the Courts of the country and the hundreds more to follow, we respectfully submit that at least some positive decision, or guide, should be indicated by the Court.

Our discussion of the facts hereinabove will be found fair, and based faithfully upon the testimony in this case. We, as attorneys, perhaps biased by our interest in the cause of our client, entertain the earnest conviction that this is not a case of liability under the Act, and perhaps our conclusions because possibly brased have little persuasion as far as this Court is concerned. However, we cannot think that the able and unbiased opinion of the Court of Appeals for the Fourth Circuit which had before it **the entire record and the arguments on both sides** should be lightly brushed aside and overruled without stated considerations. The amazingly few instances in the reports of this Court's decisions, for more than ten years, of an order and decision similar to this leads us to believe that such are issued only in cases of unmistakable merit. Whereas in this instance a reasonable study of the record shows that the conclusions relied upon in the petition for certiorari are superficial and without foundation.

In at least one of the four instances within the above mentioned period of time the Court granted a petition for rehearing and withdrew its former order granting certiorari. *Thibaut v. Car and General Insurance Corporation*, 332 U. S. 571; 332 U. S. 828.

We have not had the opportunity to investigate the records of the other cases where similar orders have been filed, but we venture the opinion that they were based on grave and striking circumstances of error, apparent from the record, or in disregard of settled legal principles.

The importance and gravity of the only reasonable conclusion that can be drawn from this decision as an interpretation of what might be actionable negligence under the Federal Employer's Liability Act require more from this Court than the mere scratch of a pen; and assuredly there should be something more substantial than mere unsupported inferences upon which to base a final judgment.

In *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, at page 339, this Court said:

> "We therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences in which event neither of them being established judgment, as a matter of law must go against the party upon whom rests the necessity of sustaining one of the inferences as against the other before he is entitled to recover."

In the case at Bar we respectfully submit, it is doubtful, to say the least, that there is any inference to sustain the contention in the petition for certiorari.

In this case the death and injuries were occasioned on a highway by the criminal and reckless act of the driver of a car, in the night time, and by its decision, this Court appears to hold that if, perchance, there had been some lighting at this crossing where this unexpected tragedy oc-

curred, the occasion of death and injury would have been prevented.

We respectfully submit there was no reason for the defendant to foresee that because a minor highway crossed its tracks, within hundreds of feet of space available for safe waiting, the plaintiffs would voluntarily take up a position within or so close to the road crossing proper, and further, that while there a reckless, criminal motorist would run them down.

As pertinent, we call attention to *Carter v. Atlantic Coast Line Railroad Co.*, 109 S. C. 119, 95 S. E. 347, where a station agent was assaulted and injured at night by a robber. The assault occurred at a spot which was dark, and this contention was relied upon by plaintiff to charge negligence of the railroad. The Supreme Court of South Carolina held (S. E. p. 359):

> "Certainly, the want of light did not directly cause or contribute to the injury. There was no causal connection whatever between the two events. That kind of an injury was neither a natural nor a probable consequence which might reasonably have been expected to result from the failure to keep all the lights burning. The want of light was merely a condition which might, or might not have influenced the intervening, independent act of the robber over whom defendant had no control."

It is needless to cite to this Court authorities to sustain the principle which it has so often enunciated that in order for recovery to be warranted under the Federal Employer's Liability Act, negligence of the defendant must be shown by the plaintiff as a proximate, contributing cause.

This Court Should Not, by Summary Reversal, Deprive Petitioner for Rehearing of the Opportunity of Presenting Argument and the Full Record of Evidence that the Court

of Appeals had before it when it Rendered what we Contend is a Correct Decision. (See Appendix "Proceedings".)

In view of the fact that the order granting certiorari and reversing the judgment below states no reasons therefor and cites no rule or precedent, we frankly cannot guess why such summary treatment was accorded. This Court might have found reasons for the grant of certiorari, without so stating, as it seems to be its practice simply to enter an order of grant or denial; but throughout the span of a number of years we are unable to find but three or four cases where this Court, in granting certiorari, has summarily reversed a judgment without a stated reason or the citation of some previous decision or decisions. There may be more than these that have escaped our attention.

It is true that in some cases this Court has granted a petition for certiorari and at the same time summarily reversed the judgment below. *Securities & Exchange Commission v. Otis & Co.*, 338, U. S. 843; *Dye v. Johnston*, 338 U. S. 864; *Ewing v. Gardner*, 341, U. S. 321; *Sweeney v. Woodall*, 344 U. S. 86; and this although briefs for both petitioner and respondent were filed. Some authorities suggest that such summary reversals are only entered where the decision below is so clearly erroneous as to make argument before this Court **a waste of time. Supreme Court Practice,** by Stern and Gressman (2d Edition) pp. 155-157. What is impressive to us, however, is that in each of these cases the Court wrote opinions or cited in the order some authority upon which its action was based.

In search of some clue as to the significance of a summary reversal where no reasons were stated or citations given, we also find from an authoritative text admonition of the danger inherent in not appearing in opposition to a petition for certiorari. **Jurisdiction of the Supreme Court of the United States,** by Robertson and Kirkham (Wolf-

son and Kurland Edition) Section 315, pp. 600-603. According to that text, which cites the Clerk of this Court, some twenty cases during the October terms, 1928-1947, were reversed or vacated on consideration of the petition for certiorari alone, no response having been filed. Upon examination of these cases, we find that this Court in all save one, either wrote a full opinion or in entering its order, either cited authority or stated the reasons for its action. One case in which this was not done was *Thibaut, supra*, 332 U. S. 571. There the Court simply reversed the judgment in much the same fashion as in the case at Bar, but subsequently, upon petition for rehearing, this order was vacated and certiorari was denied. 332 U. S. 828. We rely on that case as a precedent justifying this petition for rehearing.

We cannot believe that summary reversal ensues as a matter of course merely because no response is filed to a petition for certiorari. Nothing in this Court's rules or in its announced decisions would seem so to indicate. Nor do we believe that the petition in this case discloses any basis for granting the writ of certiorari and can only conclude that because of the volume of pending applications, and because of our own dereliction in not properly briefing the Court, the insufficiency of the issues presented for certiorari was overlooked. We earnestly trust that the Court will consider this argument in order that our dereliction may be remedied and the client whom we represent may receive justice, which it deserves, regardless of its lawyer's delinquency.

By way of explanation of our failure to file a brief in opposition, as allowed by the Rules of this Court, we beg to say that with our knowledge of the record as a whole, we felt that the showing in the petition for certiorari was improper and insufficient to support such writ. Our extreme

confidence in the decision of the Court of Appeals of the Fourth Circuit further lulled us into a sense of security. We were confident in the belief that only in the strongest kind of case would this Court grant certiorari and reverse the judgment. We further felt that even if the writ were allowed the case would be put down for a hearing, in which event we felt confident that with the entire evidence before this Court, the judgment of the Court below would be affirmed. In other words, we would welcome the opportunity to argue this case before this Court on the full record, for we are confident our contentions would be sustained.

Our mistaken understanding as to the usual course of this Court as to certiorari was the same that we find expressed in "Jurisdiction and Practice of the Courts of the United States", by Bunn (5th Edition, 1949) page 260:

> "The order will grant or deny the petition, generally, without statement of reasons and may limit the review to a particular point, or points. If the petition is denied the case is over; if granted, **it stands for brief and argument upon the merits.** A majority of all petitions are denied. (Emphasis ours.)

The Federal Employer's Liability Act is not a Workmen's Compensation Act and does not Create the Relationship of Insurer and Insured between Employer and Employee.

Accepting the rulings of the District Court and the Court of Appeals that the plaintiffs herein came within the terms and protection of the Federal Employer's Liability Act when they accepted the invitation of the railroad company to attend a Safety Meeting at Florence, and were instructed that a fast train of the defendant would stop at Jacksonboro to afford transportation thereto; under the facts of this case, the granting of the petition of certiorari and the judgment of reversal, under the facts produced, can only imply that the provisions of the liability act created

the employer an insurer of the employee's safety. The place of work was Florence, and the railroad company had no control or supervision over the movements of the employees until they boarded the train that was to be stopped for their transportation at Jacksonboro. Had they suffered injuries or death by reason of negligence of the railroad company, when boarding the train or in its operation, the situation would be different. Had there been some hidden defect known to the employer and negligently maintained, the situation would have been different.

But, we respectfully submit, the fact that all of the area in the vicinity of the place where the train would stop was in darkness could not be construed as a negligent, contributing cause to the death and injuries that resulted. The darkness was not a proximate, contributing cause of the injuries. They could have stood by the side of the tracks awaiting the train for hours and they would have suffered no wrong. The sole and direct proximate cause of the injury was the wilfull and lawless act of the driver of the automobile over whom the railroad company had no possible control.

If, instead of driving into the group of laborers, he had fired a pistol several times into the mass, with resulting injuries and death to the plaintiffs here, with equal logic it could be held that the cover of darkness was a proximate contributing cause to such reckless act. If, while they were proceeding from their homes toward the place of embarkation on the train, the reckless driver had run them down, with equal logic it could be maintained that they were engaged in their duties to the railroad company while coming to the point and the failure to light their way on the part of the railroad company was a contributing cause of the injuries suffered. In order to hold the railroad company responsible in the facts of this case, where injuries resulted

by reason of the unforeseeable lawlessness and violence of a third party, no other construction of the Federal Act is possible, than to construe it as an act affording insurance of the safety of the railroad employees.

Furthermore, the only inference to be drawn from the testimony in this case is that the plaintiffs voluntarily stopped and were waiting within the eighteen foot width of the road crossing which, of course, might or might not have been a place of danger, when available between there and the station, within which area the train would stop, was an area of perfect safety. The construction of the road in question indicates that it was, at best, a secondary highway. There was no evidence that it was much travelled, but of course it cannot be denied that there might be some danger in waiting in darkness on the roadway, but at the same time there was no danger from the darkness while waiting anywhere else within a convenient distance from where the train would stop to take on the passengers. In fact, even in waiting on the highway, the darkness in itself was not a direct contributing cause of the tragedy.

We respectfully submit that the principle enunciated in *Carter v. Atlantic Coast Line Railroad Company, supra,* should govern in this case, and the entire different set of surroundings and circumstances makes utterly inapplicable the authority of this Court in *Lillie v. Thompson,* 322 U. S. 459. There the young woman telegraph operator was engaged at her post of duty on railroad premises, in an isolated office known to be exposed to dangerous and lawless persons, where her duties required her to open the door of her office at the knock of other railroad employees who would convey to her information incident and necessary to her telegraphic employment, where the railroad had been notified of the dangerous situation and did nothing to protect her. We submit that the Court of Appeals properly held that such case had no application here where the em-

ployees had no duties to perform, where there was no work to be done and where there was available within a few steps a large area of perfect safety.

The Federal Act does not make the employer an insurer and his negligence as a proximate cause must contribute to the injury to warrant a recovery has been, to this moment, the interpretation of the law adherred to time and time again by this and other Federal Courts.

CONCLUSION

Grounds IV and V of our petition for rehearing need not be elaborated here. They speak for themselves and have been effectually treated in what has been said hereinbefore.

The aggregate of the three relatively small verdicts, amounting to less than $8,000.00, indicates clearly that the verdicts of the jury in these cases were based entirely upon sympathy and not on a finding of negligence on the part of the defendant. The jury, as well as ourselves, were sympathetic with these injured men, and clearly assuaged their sympathy at the expense of the railroad company. Attorneys for the plaintiffs made no contention before the District Court that the verdicts were inadequate, namely for Charles Bright, $1,500.00; LeRoy Smalls, $2,000.00 and they suffered serious and permanent injuries; and for the deceased Mitchel, $4,166.00. In view of their inaction in this regard, we may safely assume that they were contended in such a case as this to get anything.

We are mindful of the fact that the amount of money concerned in this case, or in these cases, is relatively little when compared with the great amounts invariably involved in causes before this Court, but under the circumstances the implications of this decision of reversal, in extending liability of railroads, under the Federal Employer's Liability Act, strikes with frightening impact the responsibility under the Act as thus extended.

In other words, the railroad at a place of non-work, which its employees voluntarily select, must protect such employees from assaults or injuries that, by chance, might be inflicted by reckless or criminal third parties, by lighting the surroundings **to make the improbable more improbable.**

The instant decision affects the interests not only of the Atlantic Coast Line Railroad Company but of every railroad carrier in the country. In effect, it makes indemnitors of railroads and virtual insurers of the safety of their employees.

We earnestly and respectfully urge this Court to vacate its order and decision of 28 February, 1955, by granting this petition for rehearing and dismissing the writ of certiorari to the Court of Appeals for the Fourth Circuit, or in the alternative, that the order of 28 February, 1955 be modified to permit the case to be assigned for argument.

Respectfully submitted,

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APPENDIX

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PROCEEDINGS

The COURT: Gentlemen, the first case to try this morning is LeRoy Smalls against Coast Line and Charles Bright against the Coast Line and Mitchell against the Coast Line. Three cases. Is this case brought under the Federal Employers Liability Act?

Mr. EDENS: Yes, sir.

The COURT: All right, Gentlemen. Are you ready in these three cases?

Mr. EDENS: Yes, sir.

Mr. DOUGLAS McKAY: We are ready, Your Honor.

The COURT: Gentlemen of the Petit Jury, give me your attention. We are about to enter into the trial of three cases which will be ried together, the first one is Leroy Smalls agains the Atlantic Coast Line. Are these white people or colored gentlemen?

Mr. EDENS: Colored people.

The COURT: Colored gentlemen. We have some colored people on the jury. Are any of you related by blood or marriage to LeRoy Smalls? If so, stand up and let it be known. (Pause and no answer.) Any of you related by blood or marriage to Charles Bright? If so, stand up and let it be known. (Pause and no answer.) Any of you related by blood or marriage to Eva G. Mitchell? If so, stand up and let it be known. (Pause and no answer.) Any of you employed by the Atlantic Coast Line Railroad Company? Or any of its affiliates, Columbia, Newberry and Laurens or Charleston and Western Carolina Railroad Companies? (Pause and no answer.) Any of you stockholders in the Atlantic Coast Line Railroad Company? (Pause and no answer.) Any other questions you gentlemen wish propounded?

Mr. DOUGLAS McKAY: None, sir.

Mr. EDENS: I don't think so, sir.

The COURT: All right, give us a jury, Mr. Clark. Gentlemen, do you think we need an alternate?

Mr. EDENS: I don't think so, Your Honor.

Mr. DOUGLAS McKAY: I don't think so.

Mr. EDENS: I would be glad to agree in the event someone should become disabled or have to go that the remaining eleven would pass on the case.

Mr. DOUGLAS MCKAY: That's satisfactory with me, Your Honor.

The COURT: Very well.

(A Jury was duly impaneled and sworn.)

(Mr. Edens opened to the Jury in behalf of the Plaintiffs.)

(Mr. Julius McKay opened to the Jury in behalf of the Defendant.)

* * *

Patrolman J. R. Grooms was duly sworn.

DIRECT EXAMINATION

By Mr. EDENS:

Q. You are a member of the State Highway Patrol of the State of South Carolina?

A. Yes, sir.

Q. And you were so engaged on the 28th of March, 1953 and stationed at Walterboro, S. C.?

A. Yes, sir.

Q. And, on that occasion, were you called upon to investigate an accident at Jacksonboro, S. C.?

A. Yes, sir.

Q. Were you on duty that night, or were you called at your home?

A. Yes, sir. I was called at home.

Q. And as a result of receiving a report concerning an accident, what did you do?

A. I proceeded to Jacksonboro to the scene of the accident.

Q. And when you got to Jacksonboro, what did you find?

A. Just before arriving at Jacksonboro, we met an ambulance which carried, I believe, two of the men that was involved in this accident, and at the scene there were another one. Those people there wouldn't leave until I got there. But soon after, they departed for the hospital.

Q. The accident occurred where?

A. Well, it's approximately; it's on Highway S 15-30, approximately half a mile south of Highway 17.

Q. Did the accident occur at a crossing?

A. Yes, sir, at the railroad crossing.

Q. At a railroad crossing and at a crossing located approximately how far from the station at Jacksonboro?

A. The railroad station?

Q. Yes, sir.

A. The railroad station, I guess, is two hundred yards down, on the south side of the track.

Q. It's two hundred yards in the direction of Charleston from the crossing that you are referring to?

A. No, sir, Savannah.

Q. Savannah. The crossing is two hundred yards south of the station or the station is two hundred yards * * *

A. The station is 200 yards south of the crossing.

Q. And in the direction of Savannah from the crossing?

A. Yes, sir.

Q. And the road which crosses there; how does it run with respect to the railroad? Does it run at right angles to the railroad or is there any curve there?

A. No, sir, exactly opposite. In other words, the highway crosses the railroad.

Q. The highway crosses the railroad. Goes straight into the railroad?

A. That is right.

Q. And straight on across?

A. Yes.

The COURT: You mean at right angles?

The WITNESS: Yes, sir. Just cross it. The railroad I believe at that point runs north and south according to the continent, but I believe the highway, it is north and south.

Q. (By Mr. EDENS): And the highway runs east and west?

A. The railroad runs east and west. The highway runs north and south. I mean, according to the continent it would be north and south but according to the compass it would be going otherwise.

Q. Did you make an investigation at the scene of the accident?

A. Yes, sir.

Q. Did your investigation indicate that an automobile had crossed that crossing?

A. Yes, sir.

Q. Did you make an investigation to determine the course that that automobile had followed when it crossed the crossing?

A. Yes, sir.

Q. Can you tell us what you found to indicate the course that that automobile followed?

A. Yes, sir. Now, on the south side of the tracks, the road is earth surfaced.

Q. Was it from the south side of the tracks that the automobile approached?

A. Yes, sir.

Q. All right, sir.

A. And the opposite side, across the railroad tracks, is pavement? From the tracks, and the marks that was found there in the highway, this car was driving on the right hand side of the road, and approximately 50 feet from the railroad track, he made a sharp left turn that way, and back to the right across the railroad track.

Q. It made a sharp left turn in a semi-circle and went across the crossing?

A. Yes, sir.

Q. Did the marks there indicate whether the car was going at any great rate of speed?

A. Well, that I don't know. The marks that was there, apparently the majority of them was from skidding on the earth surface. I don't know whether they were brake marks or * * *

Q. You don't know whether the car had on brakes or whether it was skidding in the dirt?

A. No, sir. It's approximately 50 feet of marks.

Q. From the course which the car followed, had it been going at a high rate of speed, would it have turned over?

A. Probably so, yes, sir.

Q. Had it been going at a high rate of speed, it would have turned over from the course which you saw it had followed?

A. Yes, sir.

Q. Did your investigation indicate that the car had turned over?

A. No, sir.

Q. Did you investigate the vehicle which was in the accident?

A. Yes, sir.

Q. That vehicle was located that afternoon?

A. Yes, sir.

Q. And that vehicle had what marks upon it?

A. The right headlight of the automobile was knocked out. At the time that we found it, this car had replaced the headlight at a garage in Charleston. Of course we located the headlight of the automobile. I mean, that was the only place that was bent. Well, blood was all over the front of it, but at the time we found it, he had already had it washed.

Q. The damage on the automobile then was to the right front light and fender? Was the fender damaged any?

A. Very little. I mean, I don't know exactly how much but it was very little.

Q. From your investigation of the crossing, did the right front wheel of the automobile leave the highway at any time?

A. No, sir. The left front wheel where it crossed the railroad track was approximately a foot on the cross-ties put there for travel across the railroad.

Q. That is a double main line of the railroad there? Two main lines run parallel?

A. Yes, sir.

Q. And as I understand your description of how the car crossed the crossing, about 50 feet from the crossing it swerved to the left and made a semi-circle and went through the crossing like that and continued on?

A. Yes, sir.

Q. There were how many people injured in the accident?

A. There were four.

Q. Four. One person killed?

A. Yes, sir.

Q. Do you know whether that is a passenger station there or is that just a freight station?

A. I don't know.

Mr. EDENS: You may have the witness.

CROSS EXAMINATION

By Mr. JULIUS MCKAY:

Q. Mr. Grooms, when you got to the scene of the accident, was the driver of the automobile there?

A. No, sir.

Q. Did the automobile stop after these injuries occurred?

A. From what I learned, he slowed up to almost a stop approximately two or three hundred yards down the highway, or acted like he was going to stop, but he didn't. He kept on going.

Q. He was a hit and run driver, is that correct?

A. Yes, sir.

Q. When did you later apprehend that man?

A. It was approximately six o'clock that same afternoon.

Q. Did you get his name?

A. Yes, sir. After a great deal of investigation, we finally found out who he was.

Q. What was his name; do you recall?

A. Thomas Cobb.

Q. Thomas Cobb. Now, Mr. Grooms . . .

Mr. JULIUS MCKAY: Do we have any chalk here?

Mr. EDENS: He's got his highway report.

Mr. JULIUS MCKAY: Well, what I wanted was a diagram on the board for the jury so they could understand how this crossing was. That will be all right. I think we can do without it.

Q. (By Mr. Julius McKay) Mr. Grooms, this railroad track ran perpendicular to the highway, is that right? The highway crossed it just like this?

A. Yes, sir.

Q. All right, sir. And we will say just for convenience that the railroad ran north and south and that the road ran east and west. Now, the road; it would be on the eastern side of the railroad track that it was paved, is that right, sir?

A. I mean the way I had it figured . . .

Q. Well, let's do this; let's face down the railroad track. On the left hand side, as the road crossed, it was paved, is that right? Surfaced north of the railroad track?

A. Surfaced north of the railroad track; the right hand side would be dirt.

Q. The right hand side would be dirt. All right.

The COURT: That's facing north?

The WITNESS: Yes, sir.

The COURT: Facing toward Savannah, which side would be dirt?

The WITNESS: It would be the left.

The COURT: The left hand side would be dirt?

The WITNESS: Yes, sir.

Q. (By Mr. Julius McKay) All right. Now, Cobb was driving down the dirt road, is that right, sir?

A. Yes, sir. Coming toward the pavement.

Q. All right, and the road was paved from the railroad track on one side and was unpaved on the other?

A. Yes, sir.

Q. And he was coming down the dirt side of the road?

A. Yes, sir.

Q. Now, when he was about, you say 50 feet from the crossing, he swerved to the left?

A. Yes, sir.

Q. All right. And how far on the road did he go? Did he go off on the left hand shoulder of the highway or did he go off of the road?

A. Yes, sir. His left rear tire; well, these cross-ties were about, I would say a foot and a half beyond the edge of the highway. But he lacked about a foot of going off those cross ties on the left. So, I mean, he made just a circle that way, and he did go off the road some with his left tire but his right wheel was still on the highway.

Q. And, according to the damage done to the automobile, he struck these men with his right side of his automobile, the right front fender, is that correct, sir?

A. At least one of them, yes, sir.

Q. All right. Was there any damage done to the left headlight of his automobile?

A. No, sir.

Q. The damage was restricted solely to the right front fender. Is that right, sir?

A. Yes, sir. But the blood and so forth, I don't know. Because, I mean, where he hit all of these people, I don't

know exactly on the front of the car, but I do know that one of them was hit with that light.

Q. All right. Generally, in your experience and seeing people that have been struck by an automobile, usually the automobile is damaged where they are hit, isn't that correct, sir?

A. Sometimes, yes, sir.

Q. All right, sir. And the damage on this automobile was on the right hand front fender?

A. Yes, sir.

Q. All right. Thomas Cobb; was he a white man or a Negro?

A. He was colored.

Q. He was a Negro. All right. Could you tell from your investigation approximately where the injured parties were standing at the time they were struck by the automobile?

A. The glass that was in the highway or on the railroad track was to the center of the highway.

Q. All right.

A. I don't know exactly where these other people were standing. I mean, where they were struck, but one of them was lying in the middle of the highway across the railroad track.

Q. He had been knocked across the railroad tracks on the paved side of the street?

A. Yes, sir.

Q. And he was lying in the middle of the highway there?

A. Yes, sir. And the blood showed where he lay in the highway.

Q. All right. Mr. Grooms, will you diagram that crossing and the road there and let's for convenience, as we say, have that track running north and south. That is a double track, isn't it?

A. You want me to draw it?

Q. Yes. Now, this is the road, is that correct?

A. Yes, sir. This is the highway.

Q. All right, mark on this side paved. Isn't that the paved side right there?

A. This would be the paved side.

Q. All right, sir. Now, the station is where?

A. The station is right here.

Q. All right, thank you, sir. Put station on there, please sir. Now, will you show the path that you found that automobile had traveled at the time of your investigation.

(The witness complied.)

Q. All right, sir. And, he started making that turn approximately 50 feet, that swerve, approximately 50 feet from the crossing. Is that right, sir?

A. Yes, sir.

Q. All right, sir. Will you mark an arrow there and show that is 50 feet from the crossing to where he started that turn.

(The witness complied.)

Q. All right, sir. Mr. Grooms, will you step down here now and explain your diagram to the jury. As to just how you saw this collision.

A. This automobile was traveling down this dirt highway here, and when he got approximately 50 feet from the railroad crossing here, he made a sharp left turn, right here. He ran slightly off the highway and then he made a sharp right turn and then back to the right-hand side of the highway.

Q. And went on down the highway?

A. Yes, sir. This part here is paved. This is earth surfaced. This is the railroad crossing. And that is the station —the railroad station—there.

Q. Approximately how far from the crossing is the station, did you say?

A. It is approximately two hundred yards.

Q. About two hundred yards. All right. About where was the glass and where was the injured person that you found there when you arrived?

A. Well, the glass was in the middle of the railroad tracks, right here, and the injured person was lying along here.

Q. All right. He was there when you arrived?

A. Yes, sir.

Q. And the other two men had gone by the time you got there, is that correct?

A. Yes, sir. They was fixing to load this one in the ambulance when we arrived there.

Mr. JULIUS MCKAY: All right, thank you, sir. We offer this for identification.

(Defendant's Exhibit A for identification.)

Mr. JULIUS MCKAY: Thank you, Mr. Grooms.

RE-DIRECT EXAMINATION

By Mr. EDENS:

Q. You couldn't tell exactly where anybody was when they were hit?

A. No, sir.

Q. The maneuvering of the car indicated that the driver was trying to dodge people in the highway, didn't it?

A. He did it for some reason. I don't know what.

Q. I mean he obviously; making the turn was done for some reason?

A. Yes, sir.

Q. Were there any lights there at that crossing?

A. No, sir.

Q. Were there any lights anywhere around there, as far as you know?

A. No, sir.

Q. As far as you observed?

A. No, sir.

The COURT: What time did the accident happen?

The WITNESS: The accident happened approximately 3:55 a. m. That is, in the morning.

Q. (By Mr. Edens) And you got there a little after four?

A. Yes, sir.

Q. It was dark when you got there?

A. Yes, sir.

Mr. EDENS: That's all. Come down.

RE-CROSS EXAMINATION

By Mr. JULIUS MCKAY:

Q. That was just an ordinary country crossing, wasn't it, Mr. Grooms?

A. Well, it's a residential district through there. A good many people live on that highway, or on the paved part of it.

Q. All right. But it was not in the incorporated town or city? Jacksonboro is not an incorporated town?

A. No, sir.

Q. And they just live there in that general vicinity, is that correct?

A. Yes, sir.

Mr. JULIUS MCKAY: That's all.

Mr. EDENS: All right, come down.

Eva G. Mitchel was duly sworn.

DIRECT EXAMINATION

By Mr. EDENS:

Q. You are Eva Mitchel?

A. Yes, sir.

Q. And your husband was killed last March 28th?

A. Yes, sir.

Q. And your husband worked for who?

A. Atlantic Coast Line.

Q. How long had he worked for them?

A. It was in the 8th year.

Q. And how old was your husband when he was killed?

A. 32.

Q. Do you all have any children?

A. Yes, sir.

Q. How many?

A. Three.

Q. What are their ages?

A. Ages, eight, six and four.

Q. What did he do for the railroad?

A. Just a laborer.

Q. Where was he going the night that he was killed?

A. Safety Meeting.

Q. Where?

A. At Florence.

Q. Do you know how he was to go?

A. By train.

Q. Do you know where he was to meet the train?

A. At the crossing.

Q. Where?

A. Jacksonboro.

Q. How was his fare to be taken care of?

A. By going?

Q. How was his ticket or fare?

A. He had a pass.

Q. Do you know if he had responsibility for anybody else that night?

A. Yes. He picks up, I don't know how many to carry on his pass. How much it was, I don't know.

Mr. DOUGLAS MCKAY: Your Honor, I can hardly hear the witness.

The COURT: I didn't hear that last answer myself.

Q. (By Mr. Edens) What did you say about the pass?

A. He carries a pass. How many he is to carry on that pass, I don't know.

The COURT: All right.

Q. (By Mr. Edens) How do you know he had to go to this safety meeting?

A. Because he tells me that he has to.

Mr. DOUGLAS MCKAY: Well, I object to what he told her, Your Honor.

The WITNESS: He just told me he had to be at the Safety Meeting.

The COURT: One minute and let me answer the objection.

Mr. DOUGLAS MCKAY: Now, the question is whether he had to go. That has some significance.

The COURT: Is there any controversy about that, that he was ordered to go by the company?

Mr. DOUGLAS MCKAY: Yes, he was not ordered to go by the company.

The COURT: He wasn't requested to go?

Mr. DOUGLAS MCKAY: Yes, sir. He was requested.

The COURT: Well, if there is no controversy about it, I see no objection to it.

Mr. DOUGLAS MCKAY: I don't know whether there is a controversy or not.

The COURT: Well, let's see what her answer is. What did he say?

Q. (By Mr. Edens) How did you know he had to go to the Safety Conference?

Mr. DOUGLAS McKAY: We object to that.

The WITNESS: He told me that; that he had to go to the Safety Meeting.

Mr. DOUGLAS McKAY: That is my friend's question.

Q. (By Mr. Edens) Well, how did you know where he was going?

A. He told me that.

Q. Did he * * * he told you that he had to what?

A. To go to the Safety Meeting.

Mr. DOUGLAS McKAY: You see, Your Honor.

The COURT: Well, if a railroad company requests them to go to the Safety meeting, I think they would go.

Mr. DOUGLAS McKAY: Well, we have other testimony that clears it up.

The COURT: I don't think there is any question about that. Go ahead.

Q. (By Mr. Edens) Did you know anything about how long he was supposed to be gone?

A. From home?

Q. Yes.

A. Around about 25 or 30 minutes.

Q. You mean he was gone that long from your house before he was killed or before he was hurt?

A. Yes, sir.

Q. You live about how far from there?

A. About a mile.

Q. About a mile from where he was hurt?

A. Yes, sir.

Q. Did you pack any lunch for him to take?

A. He said don't carry any lunch because they furnish lunch for them.

Q. How old are you?

A. 26.

Q. When did you know he was hurt?

A. My father come and told me about 7:00 o'clock that morning.

Q. And when you found out he was hurt, what did you do?

A. I went to the hospital and when I got there, he was dead.

A. My home is in Jacksonboro. I lived there 12 years.
Q. Were you living there in March of last year?
A. Yes, sir. The 28th of March I was living there.
Q. Were you hurt that night of March 28th?
A. Yes, sir.
Q. Or the morning of March 28th?
A. Yes, sir.
Q. Where were you going that night?
A. Going to a safety meeting.
Q. Where?
A. Florence.
Q. When did you know about the Safety Meeting?
A. Just about two weeks ahead of time.
Q. How did you learn about it?
A. My foreman told me about it.
Q. Who is your foreman?
A. Mr. Harold, that is all I know. Mr. Harold.
Q. And what did he tell you?
A. He told me that there is going to be a safety meeting at Florence. And they all met at the crossing at Jacksonboro at 4:00 o'clock.
Q. Well, what were you going to meet at 4:00 o'clock at the crossing at Jacksonboro for? How were you going to get to Florence?
A. By a train.
Q. And you were to meet the train at the crossing at Jacksonboro?
A. Yes, sir.
Q. Well, when did you go to the crossing?
A. I reckon I got there around about quarter to four that morning?
Q. Was anybody else there when you got there?
A. Yes, sir. Some more boys was there.
Q. Well, before the accident when you got hurt, were there other people there with you?
A. Before I got hurt?
Q. Yes.
A. They all was there.
Q. About how many were around there?
A. I would put it around 16 head, I think it was.

Q. About sixteen head and where were they?

A. Standing by the side of the crossing.

Q. You were hurt?

A. Yes, sir.

Q. Did you see the automobile that hit you?

A. I just could. I could make it out when it was coming towards me, and that's about all I could remember at that time.

Q. Well, where had you all been standing before this car hit these people?

A. Right to the crossing.

Q. At the crossing?

A. At the crossing, yes, sir.

Q. Well, what happened to you?

A. Well, when I did come to; you mean about the accident?

Q. Yes. Did you get hurt?

A. Right in my neck, and right in here and legs.

Q. Do you have any trouble with your neck now?

A. Quite often in the night time. It worries me sometime.

Q. Do you have any trouble with your shoulder?

A. Yes, sir. I do. When I move it around too much.

Q. Well, are you back on your job you had when you got hurt?

A. No, sir. I know I wouldn't be able to take it.

Q. Why?

A. My shoulder won't let me.

Q. Your shoulder won't let you do it?

A. No. I know it won't.

Q. How do you know it won't let you do it?

A. Because I tried it around home, working, moving different things around there, it do pain me sometime.

Q. When you say it do pain you sometime, is the time you are talking about when you are using it?

A. Yes, when I am using it, yes, sir.

Q. These gentlemen want to know how bad hurt you are. I want you to tell us just how bad hurt you are, and if you can't work like you could before we want you to

Q. He was dead before you got there. Do you know generally what kind of work he did for the railroad when he went to work in the morning or at night or whenever he worked for them?

A. No. All I know is he just was a laborer.

The COURT: Did he work on the sections as a section hand?

The WITNESS: Yes, sir.

The COURT: That is on the railroad tracks?

The WITNESS: Yes, sir.

The COURT: She said he worked as a section hand on the railroad tracks.

Mr. EDENS: You don't deny that he worked in inter-state commerce, do you, Mr. Doug?

Mr. DOUGLAS MCKAY: No. But I deny that he was engaged in inter-state commerce at the time.

Mr. EDENS: Well, I understand that. But his general duties with the railroad were . . .

Mr. DOUGLAS MCKAY: Certainly any section hand works in inter-state commerce, of course.

The COURT: All right.

Q. (By Mr. Edens) How much did your husband make a week?

A. $45.00 a week.

The COURT: How old was he?

The WITNESS: 32.

The COURT: Go ahead.

Mr. EDENS: You may have the witness.

By Mr. DOUGLAS MCKAY:

Q. Eva, about how far is your home from the Jacksonboro crossing?

A. A mile.

Q. About a mile?

A. Yes, sir.

Q. And you of course don't know just when your husband was killed, do you?

A. No, sir.

Q. He left there early in the morning you said?

A. Yes, sir.

Q. He was to take the train there at Jacksonboro to go to what they call a safety meeting at Florence?

A. Yes, sir.

Mr. McKAY, SR.: All right, that's all.

Mr. EDENS: Come down.

Leroy Smalls was duly sworn.

DIRECT EXAMINATION

By Mr. EDENS:

Q. You are LeRoy Smalls?

A. Yes, sir.

Q. Where do you live?

A. Jacksonboro.

Q. You have lived there how long?

A. Around about 12 years.

Q. How old are you?

A. 32.

Q. You work for the railroad? Were you working for the railroad on the 28th of March of last year?

A. Yes, sir.

Q. And you had been working for them how long?

A. Just about 12 years.

Q. And you did what for them?

A. Labor.

Q. What kind of labor?

A. Handling rails and cross-ties and rocks.

Q. On the railroad track?

A. Yes, sir.

The COURT: You were a section hand?

The WITNESS: That's right.

The COURT: Go ahead.

Q. (By Mr. Edens) Did you move up and down the track on a little pump car or motor car?

A. Motor car, yes, sir.

Q. How much did you make a week?

A. I cleared around about $45.00 a week.

Mr. DOUGLAS McKAY: How much did he say?

Mr. EDENS: Around $45.00 a week he said he cleared.

Q. (By Mr. Edens) Your home is in Jacksonboro or around Jacksonboro?

tell us why you can't. What kind of work did you do on the railroad?

A. Well, putting in ties under the rails, hauling rocks.

Q. Did they have one of those sticks with a heavy piece of iron on the end of it? Did they have a sledge hammer in your job?

A. Yes, sir.

Q. Were you called on to use the sledge hammer?

A. Yes, sir. I hauled rock and used the sledge hammer all the time.

Q. Can you use a sledge hammer now?

A. No, according to my feeling I can't, I know I can't.

Q. What work have you done since you were hurt?

A. Well, I worked at a saw mill about two months.

Q. When?

A. In June.

Q. How did you get along?

A. It was all right at the time. There wasn't nothing but some little boards.

Q. You were handling little boards?

A. Yes, out of the dry kiln?

Q. Can you show us where you hurt your knees?

A. Well, this was sprained right in here. It was swollen up right in there.

Q. Well now, your shoulder and your neck; is that the main trouble you have now?

A. That is the main trouble, yes, sir.

Q. Does it bother you at night?

A. Yes, sir.

Q. Have you been able to make any money except for that two months? What have you been doing since you left the planing mill?

A. What have I been doing?

Q. Yes.

A. Well, I am drawing Social Security.

Q. For how long can you draw Social Security?

A. It will be cut out in June.

Q. Cut out this coming June?

A. Yes, sir.

Q. Has the railroad offered you your job back?

A. No, sir. I haven't seen anyone.

Mr. EDENS: You may have the witness.

CROSS EXAMINATION

By Mr. DOUGLAS McKAY:

Q. You said you couldn't do your other job now, anyway, didn't you LeRoy?

A. Yes, sir.

Q. That is your opinion, that you couldn't do the work of a section foreman?

A. Yes, sir.

The COURT: Section man.

Q. (By Mr. Douglas McKay): I mean section hand, yes, sir. Now, LeRoy had you been to a safety meeting before?

A. Yes, sir.

Q. Where did they have it at the time you went before?

A. In Savannah?

Q. In Savannah?

A. Yes, sir.

Q. You had a right good time, didn't you, down there with it?

A. Yes, sir.

Q. They gave you a barbecue and pretty good food. They fed you; that's what they do at those meetings?

A. No, they didn't give me nothing to eat that night.

Q. Well, they provided something for you anyway, though, didn't they?

A. That night?

Q. I'm talking about your Safety Meeting in Savannah.

A. Oh, yes.

Q. When you went there, they gave you something to eat; they had a barbecue or something, didn't they?

A. No, sir.

Q. Well, they gave you your meals, didn't they?

A. No, sir.

Q. Well, they gave you the money to get your meals, didn't they?

A. No, sir.

Q. Where did you get the money for your meals?

A. I didn't eat no meals there.

Q. You didn't eat any meals?

A. No, sir.

Q. How long did your meeting last?

A. Two hours.

Q. About two hours? So, you just went there for two hours and then came back?

A. That is right.

Q. I see. So you weren't there a whole day?

A. I wasn't there a whole day. I was working at night.

Q. Now they invited you, you say, on that time to go to Savannah? Is that correct?

A. The 28th of March?

Q. No, I say they invited you; the Coast Line invited you to go to Savannah for that meeting?

A. Yes, sir.

The COURT: You said on that date. He said on the 28th of March.

Mr. DOUGLAS MCKAY: Oh, I didn't hear him say on the 28th of March.

Mr. MCKAY: Well, on the 28th of March, you were down there near the Jacksonboro station to take the train?

A. Yes, sir.

Q. And they had told you the train was going to stop for certain of you men?

A. Yes, sir.

Q. About how far do you live from Jacksonboro?

A. Well, I call it a mile. It was a mile.

Q. About a mile?

A. Yes, sir.

Q. So, you got there early in the morning; in plenty time?

A. Yes, sir.

Q. That train usually doesn't stop at Jacksonboro, does it?

A. No, sir.

Q. But it was going to stop that morning to pick you all up?

A. Yes, sir.

Q. Now, LeRoy, you were waiting down at the railroad crossing, I mean the road crossing; you were waiting for the train to come and when it stopped you were going up and get on it, that right?

A. Well, yes, sir.

Q. It's a little uncertain along there just exactly where the passenger car will stop, isn't it? Where does the passenger car usually stop?

A. Well, there is a flag station, it mostly stops, they have no exact place to stop, that is right.

Q. But it will stop between the crossing and the station, wouldn't it, somewhere in that distance between the crossing and the station?

A. Yes, sir.

Q. What side of the crossing were you on when you were hit?

A. On the right hand side.

Q. You mean you were on the right hand side of the tracks?

The COURT: Facing toward Savannah, which side of the tracks were you on?

The Witness: On the south side.

Q. By Mr. Douglas McKay) On the Savannah side?

A. Yes, sir. The south side.

Q. Were you out in the highway or were you off of the highway?

A. I was off of the highway.

Q. You were off of the highway on the south side?

A. Yes, sir.

Q. In other words, when you were struck, you weren't in the highway?

A. No, sir.

Q. Did you see that car coming?

A. Yes, sir, I could see it coming. And that's all I could remember when I seed it coming.

Q. I see. You saw the lights?

A. Yes, sir.

Q. And did he hit you? Did he whirl and turn to the left as the officer has said?

A. Yes.

Q. And hit you on the left hand side or the south side of the road?

A. Yes, sir.

Q. You are sure you weren't standing out in the highway?

A. No, sir. I wasn't standing out in the highway?

Q. So, what happened was that this man driving that car coming along on the right hand side of the highway, when he got close to where you all were, whirled and went to the left and, during that time, hit you? That is what happened, isn't it?

A. Yes, sir.

Q. Did he stop, LeRoy?

A. I didn't know anything about that.

Q. You don't know whether he stopped or not?

A. No, sir. That's all I could remember.

Q. Were you unconscious right afterwards?

A. Yes, sir.

Q. And they carried you on to the hospital?

A. Yes.

Q. Do you know the man who ran over you?

A. Yes, I knowed him.

Q. Had you known him before this time?

A. I have seen him but I didn't know him, now.

Q. You have seen him. Do you know whether he had any grievance against you or anybody else to make him do such a crazy thing?

A. No, sir.

Q. You don't know?

A. No, sir.

Q. By the way, who do you work under, Mr. Mitchum or Mr. Hill?

A. Mr. Mitchum, that is right.

Q. Mr. Mitchum?

A. That is right.

Q. And he wasn't there?

A. No, sir, he wasn't there. He told us to meet at the crossing.

Q. But he had told you the train was going to stop?

A. Yes, sir.

Q. And if you wanted to go to the Safety Meeting, you could go, is that correct?

A. He told me to be there.

Q. All right.

The COURT: What were the exact words he told you?

The WITNESS: Sir?

The COURT: What were the words he told you about going to the Safety Meeting? Just tell me what he said to you.

The WITNESS: He told me to be at the Jacksonboro crossing to go to the Safety Meeting on the 28th of March.

The COURT: At what hour?

The WITNESS: That the train would be there at five minutes to four.

The COURT: All right.

Q. (By Mr. Douglas McKay) LeRoy, didn't Mr. Mitchum tell you that there was going to be a Safety Meeting, that he would like for you to go but that you didn't have to go?

A. That he told me that?

Q. Yes.

A. He told me to be there.

Q. He didn't tell you that you had to, did he?

A. Well, he told me to be there at the crossing?

The COURT: Did he tell you you didn't have to go or not?

The WITNESS: He didn't tell me I didn't have to go, sir.

The COURT: All right.

Mr. DOUGLAS MCKAY: All right, that's all.

RE-DIRECT EXAMINATION

By Mr. EDENS:

Q. You say there were about 14 head of fellows standing around the crossing when the car hit these folks?

A. Yes, sir, as much as I can remember.

Q. They were standing all around, all over the crossing?

A. Yes, sir.

Mr. EDENS: That's all.

RE-CROSS EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. Just one question more; LeRoy, how many section hands are there in Mr. Mitchum's gang that you worked with at that time?

A. My section?

Q. Yes.

A. It was seven.

Q. Seven. Were they all there that morning with you?

A. Yes, sir, as far as I could remember, all was there.

Q. So far as you know?

A. Yes, sir.

Q. And there were some of Mr. Hill's men there too?

A. Yes, sir.

Q. All right.

The COURT: Aynthing further from this witness?

Mr. EDENS: Come down.

Charles Bright was duly sworn.

DIRECT EXAMINATION

By Mr. EDENS:

Q. You are Charles Bright?

A. Yes, sir.

Q. And you live where?

A. Jacksonboro.

Q. Speak loud so everybody can hear you, Charles.

A. Jacksonboro.

Q. How far do you live from the crossing where this accident occurred?

A. About a mile.

Q. Everybody lives about a mile from that crossing in Jacksonboro?

A. Yes, sir.

Q. Were you working for the railroad on March 28th?

A. Yes, sir.

Q. Of last year?

A. Yes, sir.

Q. And what did you do for the railroad?

A. Worked ties with picks and rocks.

Q. You worked on the section gang?

A. Yes, sir.

Q. And who was your foreman?

A. Mr. Hills.

Q. And Mr. Hills lives where?

A. He lives there at Jacksonboro.

Q. Put your hand down, we can't hear what you are saying. Now, you speak out so we can hear you. Mr. Hill was your Foreman?

A. Yes, sir.

Q. And he lives where?

A. Jacksonboro.

Q. How far did he live from this crossing?

A. About 45 feet.

Q. From this crossing?

A. From the crossing it was about 200 yards.

Q. About 200 yards from this crossing?

A. Yes, sir.

Q. What railroad is it you work for?

A. Coast Line.

Q. The Coast Line Railroad?

A. Yes, sir.

Q. You had been working for them how long up until the time you got hurt?

A. About five years.

Q. And how much money did you make a week?

A. Around $45.00.

Q. Around $45.00 a week?

A. Yes, sir.

Q. And you worked on the section gang and helped keep up the track?

A. Yes, sir.

Q. You chug-chugged up and down the track on a little motor car?

A. That is right.

Q. Where were you going on the night of March 28th of last year?

A. Going to Florence to attend the Safety meeting.

Q. Going where?

A. Florence.

Q. How did you know about the Safety Meeting?

A. Mr. Hill told us about it two weeks ahead.

Q. Told you what?

A. That a fast train at the crossing, to catch to go to Florence, on the 28th of March.

Q. Where did he say to meet?

A. At the crossing.

Q. At the crossing where?

A. At Jacksonboro.

Q. And you were going to catch a fast what?

A. Train.

Q. And to go to Florence?

A. Yes, sir. The train was going to stop there. They was going to have the train stop there to pick us up.

The COURT: What time did he tell you to meet there?

The WITNESS: Five minutes to four.

Q. (By Mr. Edens) That night did you go . . .

The COURT: Was it morning or afternoon?

The WITNESS: In the morning.

The COURT: Go ahead.

Q. (By Mr. Edens) Did you go to the crossing as he instructed you to?

A. Yes, sir.

Q. Were there other people at the crossing?

A. Yes, sir.

Q. Were you there when this car hit these folks?

A. Yes, sir.

Q. Were you hit at the crossing?

A. Yes, sir. I'm one that got hit too.

Q. Well, where were you?

A. In the road.

Q. With the other people there in the road?

A. Yes, sir.

Q. Did you see the car coming?

A. When I did saw it, it was too late. I couldn't move when I did saw it, when I realized . . .

Q. Were you hurt?

A. Yes, sir.

Q. Where were you hurt?

A. Right here.

Q. Stand up and let the jury see. You have got the inside of your knee torn?

A. Yes, sir.

Q. Where else were you hurt? Here, let the judge see where your leg was torn?

The COURT: All right, I see it.

Q. (By Mr. Edens) Was your other knee hurt?

A. Yes, sir.

Q. On the top?

A. Yes, sir.

Q. Were you hurt any where else?

A. On the side.

Q. Your hip was hurt?

A. Yes, sir.

Q. How old are you?

A. 42.

Q. Are you sure?

A. Yes, sir.

Q. Do you have any trouble with your hip and your knees?

A. Yes, sir. I have trouble with my hip and knees.

Q. What kind of trouble do you have with your hip?

A. Now and then it hurts me. If I do lots of walking, it will hurt me.

Q. Well, does it keep you from doing any hard work?

A. I don't think I will ever do any hard work. I can't lift much on account of this leg here.

Q. Well, have you gone back to work on the railroad?

A. No, sir.

Q. Have they offered you your job back?

A. No, sir.

Q. Have you done any work since you got hurt?

A. No, sir.

Q. Did you take any lunch with you that night?

A. No, sir.

Q. Did you take any food with you to eat the next day?

A. No, sir.

Q. Why didn't you?

A. He told us we would have food there. He said we would have some chicken and pork chops.

The COURT: Well, did they have? Oh, you didn't go, though.

Q. (By Mr. Edens) Did they have any chicken or pork chops in the hospital?

A. If they did, I didn't see any there.

Q. Did they take you to the hospital that morning?

A. Yes, sir.

Q. How long were you in the hospital?

A. How long I was in the hospital?

Q. Yes.

A. Two months.

Q. Who paid the hospital bill?

A. I paid it myself.

Q. How much was it?

A. Over five hundred dollars.

Q. Have you got your bill?

A. I haven't got it with me. I have got it home.

The COURT: How much was it?

Mr. EDENS: Over five hundred dollars.

The COURT: All right, go ahead.

Q. (By Edens) How much was your doctor's bill?

A. I dis-remember.

Q. Have you paid that, yourself?

A. Yes, sir. Paid it myself.

Q. Well, was it a hundred dollars, or two hundred dollars or three hundred? What was it, about?

A. I just can't remember now.

Q. The doctor's . . .

The COURT: Well, about how much to the best of your memory?

The WITNESS: In all?

The COURT: Yes, your doctor's bill.

The WITNESS: Well, I think all the doctors' bills run four hundred dollars.

Q. (By Mr. Edens) Are you still going to the doctor from time to time?

A. Just from the doctor Saturday.

Q. After this accident, did you have to have your stomach operated on?

A. Yes, sir.

Q. And you had that done; the doctor in Walterboro sent you to Charleston?

A. Yes, sir.

Q. And they cut you in the stomach?

A. Yes, sir.

Q. Were you hit in the stomach in the wreck, in the accident?

A. Yes, sir.

Q. How long after the accident was it you had the operation in Charleston. About how long?

A. About how long?

Q. Yes, about how long was it after you were hurt that you were operated on in Charleston?

A. You mean from that time up until now?

Q. No.

The COURT: How long after the accident were you operated on is what he asked you. How long was it after the accident before you had your operation?

The WITNESS: About three weeks.

The COURT: Go ahead.

Q. (By Mr. Edens) And that was in Charleston?

A. Yes, sir.

Q. Was Mr. Hill going to the meeting that morning?

A. Yes, sir.

Q. Had you seen him around that morning before the accident?

A. Yes, sir.

The COURT: Was he there at the crossing?

The WITNESS: No, sir.

The COURT: Go ahead.

Mr. EDENS: That's all.

CROSS EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. Doctor Bennett was your doctor, wasn't he?

A. Yes, sir. I had so many. Dr. Bennett was my last doctor.

Q. He was your last doctor?

A. Yes, sir.

Q. He said he saw you when you came to the hospital that morning.

A. Yes, sir. He saw me that morning.

Q. What is your first name?

A. Charles Bright.

Q. Charles Bright. Charles, now, you worked under Mr. Hill?

A. Yes, sir.

Q. Had you ever been to a Safety Meeting before?

A. Yes, sir.

Q. You went to the one in Savannah?

A. No, sir. I went to a Safety Meeting in 1929, at Yamasee.

Q. At Yemassee?

A. Yes, sir.

Q. Well, you didn't have to take the train to go there?

A. I was working right there, on the extra gang.

Q. So they had a safety meeting. Now, this safety meeting was going to be held at Florence, wasn't it?

A. Yes, sir.

Q. On the 28th. And Charles, didn't Mr. Hill, your foreman, tell you that they would like for you to go but you didn't have to go?

A. He told me to be at the crossing.

Q. He told you you had to go?

A. Yes, sir.

Q. You are on your oath now. You swear that he told you you had to go?

A. Yes, sir.

Q. You are under oath.

A. Yes, sir.

Mr. EDEN: Your Honor, he said he is under oath two or three times.

Mr. DOUGLAS MCKAY: Well, I will say it again, may it please the Court.

The COURT: Well, as far as that is concerned, I think the witness has been duly sworn and he knows he is under oath. When the Clerk swears him, he knows he is under oath as far as that is concerned.

Mr. DOUGLAS MCKAY: I wanted him to realize it, Your Honor.

Q. (By Mr. Douglas McKay) And once more, I will ask you, you say he told you you had to go?

A. Yes, sir.

Q. Who told you to say that?

A. Who told me to say that?

Q. Who told you to say that?

A. Myself.

Q. Yourself?

A. Yes.

Mr. EDENS: Now, if The Court pleases, that's an inference that's got no business in this case and, if he's got any kind of information that anybody told him to say that, he can bring it out.

Mr. DOUGLAS MCKAY: If I had it, I would bring it out, but I want to tie the witness down, Your Honor.

Mr. EDENS: That's not tying a witness down, to ask him who told him to say something.

The COURT: In other words, if you have somebody that will testify that he told him to say that, I think it would be a proper question but I doubt whether you should, without anything to go on at all, to accuse the witness of somebody having told him that. I have some doubts about that.

Mr. DOUGLAS MCKAY: Your Honor, couldn't I ask him "Did anybody else tell you to say that?"

The COURT: Oh, yes, you can ask him did anybody tell you to say that. You can ask him that.

Mr. DOUGLAS MCKAY: Yes, sir. Well, I think that's about the same thing.

The COURT: No, it's not. When you say who told you to say that, that's inferring that somebody did tell him. Now, you can ask him did anybody tell him to say that.

Mr. DOUGLAS MCKAY: I see your difference, Your Honor. I entirely agree with you, of course.

The COURT: All right.

Q. (By Mr. Douglas McKay) Did anyone tell you to say that?

A. No, sir.

Q. What's that?

A. No, sir.

Q. All right.

A. Nobody but myself.

Q. Now Charles, they did tell you that they were going to take you there on the train and bring you back, and going to give you a good dinner?

A. Yes, sir.

Q. Pork chops. Were you the one that said about the pork chops?

A. Yes, sir.

Q. Chicken and so on?

A. Yes, sir.

Q. Then you were going to meet at the YMCA in Florence?

A. In Florence, that's all I know; nothing about the YMCA. He told me at Florence.

Q. All right, you didn't know where it was. Now, once again, do you deny that Mr. Hill told you that you didn't have to go but they would like to have you go?

Mr. EDENS: If Your Honor pleases, he has already asked him that two or three times.

The COURT: I think so. I think there is some limit to it. He's already said . . . I will ask you, did Mr. Hill tell you you did not have to go or not?

The WITNESS: He told me I would have to go.

The COURT: All right. I think he's already answered that five or six times. I think that probably is the limit.

Mr. DOUGLAS MCKAY: I didn't realize I had gone that many times.

The COURT: I think you have.

Mr. DOUGLAS MCKAY: I have got a contradiction on it.

Mr. EDENS: Mr. Hill is here?

Mr. DOUGLAS MCKAY: Yes, you took his testimony and he told you.

The COURT: Go ahead.

Q. (By Mr. Douglas McKay) Now, Charles, how far did you say you lived; a mile away from the crossing?

A. Yes, sir.

Q. Where were you standing at the time you were hit?

A. In the road, in the crossing.

Q. In the cross road?
A. Yes, sir.
Q. Were you on the railroad tracks?
A. I was in the crossing.
Q. You were in the highway?
A. Yes, sir.
Q. Where it crosses the railroad tracks?
A. Yes, sir.
Q. Were you standing out between the tracks?
A. No, sir, I was standing in the crossing.
Q. Well, I don't know just what you mean?

The COURT: Well, were you standing on the railroad tracks or in the road bed of the roadway?

The WITNESS: I was standing on the road.

The COURT: On the road?

The WITNESS: Yes, sir.

The COURT: Not on the railroad tracks?

The WITNESS: On the railroad track. Just like the railroad. . . .

The COURT: In other words, you were standing where the road crosses the railroad?

The WITNESS: Yes, sir.

The COURT: What?

The WITNESS: Yes, sir.

The COURT: All right.

Mr. DOUGLAS MCKAY: I think that answers it.

The COURT: Go ahead.

Q. (By Mr. Douglas McKay) You were merely told to meet that train at Jacksonboro, weren't you?

A. Yes, sir.

Q. You could stand anywhere you pleased until the train came, couldn't you?

A. Until the train came?

Q. Until the train came, yes. Is that right?

A. Well, I stood up where the rest of the men were standing up.

Q. You stood up where the rest of the men were standing?

A. Yes, sir.

Q. Well, nobody told you you had to stand in the railroad crossing, did they?

A. No, sir. Nobody told us to.

Q. Nobody told you that?

A. No, sir.

Q. And you could have stood up at the station if you had wanted to, couldn't you?

A. At the station?

Q. Yes.

A. I don't see no station there.

Q. Well, isn't there an old freight station up there?

A. Yes, sir.

Q. You could have stood up there if you had wanted to, couldn't you? It's all right for you to be there. You could have stood anywhere along there is what I'm asking.

A. According to where the train stops at. According to where to catch it at.

Q. Well, the train doesn't stop at that crossing, does it, where you were?

A. Sure it stops there.

Q. It does?

A. It catches me a many a time at the crossing.

Q. Doesn't it stop between that roadway and up where that building is, the old freight station?

A. It stops between there but sometimes we get off on the other side of the crossing.

Q. Sometimes you get off on the other side of the crossing?

A. Yes.

Q. That depends on how long the train is, doesn't it?

A. How long it is, yes, sir.

Q. Those fast trains hardly ever stop at Jacksonboro, do they?

A. No, sir. They don't stop there unless they have got orders.

Q. Have you ever seen a fast train stop there before?

A. Yes, sir. I seen #75 stop there.

Q. You seen #75 stop there?

A. Yes, sir. A fast train.

Q. Now, this train that you went on was another train. It wasn't #75?

A. No, sir.

Q. #75 doesn't stop there all the time, does it?

A. No, sir.

Q. You have never seen one of those north bound trains stop there have you, Charles, one of those north bound fast trains?

A. Yes, sir.

Q. You have seen one?

A. #75. I have seen it stop there.

Q. Well, #75 is the only one you say you have seen stop there?

A. Yes, sir.

Mr. DOUGLAS MCKAY: All right, that's all.

Mr. EDENS: Come down.

LeRoy Smalls was recalled.

RE-DIRECT EXAMINATION

By Mr. EDENS:

Q. How much were your doctor and hospital bills?

A. $379.00.

Q. Three hundred and seventy-nine dollars up to now?

A. Yes, sir.

Q. Are you still going to the doctor?

A. Yes, sir.

Mr. EDENS: Any questions, Mr. Doug?

Mr. DOUGLAS MCKAY: No questions.

Mr. EDENS: All right. Have a seat.

Eva Mitchell was recalled.

RE-DIRECT EXAMINATION

By Mr. EDENS:

Q. How much were the hospital bills for your husband?

A. I was only $16.00 for the little time he was there.

Q. How much was the funeral bill?

A. $577.00.

Mr. EDENS: Any questions?

Mr. DOUGLAS MCKAY: No questions.

Mr. EDENS: That's the plaintiff's case.

The COURT: Anything for the defendant?

Mr. DOUGLAS MCKAY, SR.: Would Your Honor give us a short recess?

The COURT: Yes, we will take a recess for a few minutes.

(Short recess.)

(While the jury was still out of hearing of the courtroom. The Court heard the following motion.)

Mr. DOUGLAS MCKAY: May it please the Court, at this stage of the case, we desire to ask for a direction of verdict in our favor—If Your Honor overrules us, of course we are ready to go on—on the ground that there is not sufficient actionable negligence of the defendant to warrant this case being submitted to the jury. Further, Your Honor, that the only reasonable inference to be drawn from the entire testimony is that these plaintiffs came to their injuries and one to death by virtue of the wrongful act of a third party over whom the defendant had no control whatsoever. Now, Your Honor, the testimony is that these people were at the crossing waiting for a train to come. And, while standing there in the darkness of the early morning, this hit and run driver came charging by, swerved from the right hand side of the road, ran into them, causing the injuries complained of.

(Discussion.)

The COURT: Well, I will take it under advisement. It's a mighty close case. But I'm inclined to think that the Supreme Court of the United States, as now constituted, would reverse me if I direct a verdict. Bring in the jury.

Mr. DOUGLAS MCKAY: Just one other ground. That there is not sufficient evidence here that these people at the time were engaged in interstate commerce.

The COURT: I don't think you have got anything on that. You may have something on your first point but I don't think you have got anything on that point at all. Bring in the jury.

(The jury was brought back in the courtroom.)

Mr. J. Q. Fowler was duly sworn.

DIRECT EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. Mr. Fowler, for some years you have been employed by the Atlantic Coast Line Railroad Company, haven't you?

A. Yes, sir.

Q. What was your position in 1953?

A. Roadmaster, stationed at Charleston.

Q. You are now still in that same position?

A. Same position, yes, sir.

Q. Does your territory include the territory at Jacksonboro and along that area of the track?

A. Yes, sir. It does.

Q. Now, Mr. Fowler, as Roadmaster, state what you did with regards to notifying the men under you of a safety meeting at Florence to be held in March, 1953?

A. Well, I notified all the foremen of the meeting and invited them to. . . .

MR. EDENS: Now, we object; that's pure hearsay of course, Your Honor.

THE COURT: Have you got your notice in writing?

THE WITNESS: Yes, sir. I have a copy of it.

THE COURT: I think that's competent. If he notified them in writing, I think that is competent to . . .

THE WITNESS: I have a copy.

THE COURT: Will you please let me rule. Let me be judge and you be witness if you don't mind.

THE WITNESS: Excuse me.

THE COURT: As I started to say when I was interrupted by the witness, Mr. Edens, he has a copy of the notice that he sent out to the foremen. I think that is competent. I mean that part itself; not what he says about it, but the written part itself. I will admit that.

MR. EDENS: As to the fact that they did do that, we question.

THE COURT: Well, I will admit the writing that he sent to the foremen. Go ahead.

Q. (By Mr. Douglas McKay) Was that notice sent to Mr. Hill and Mr. Mitchum?

A. Yes, sir.

Q. Have you got the copy of your notice?

A. Yes, sir.

The COURT: Submit it to counsel.

Mr. EDENS: You haven't got a plain copy?

The COURT: Is that the best copy you have?

The WITNESS: Yes, sir. That is the best one we have.

Mr. DOUGLAS MCKAY: We have got one other. I don't know whether it's any better than that.

The COURT: You might look at it. Can you read it?

(Defendant's Exhibit B.)

Mr. EDENS: This is what he says he sent to the foreman?

Mr. DOUGLAS MCKAY: Sent to the Foreman, including Mr. Hill and Mr. Mitchum. Mr. Foreman, and gentlemen of the jury, I will read this notice.

(Mr. Douglas McKay read Defendant's Exhibit B.)

Q. (By Mr. Douglas McKay) Now, Mr. Fowler, pursuant to that notice, the meeting was held at Florence?

A. The meeting was held, yes, sir.

Q. And will you state whether this train No. 367 was instructed to stop at Jacksonboro?

A. He was instructed to stop.

Q. Was that a convenient spot for the laborers who worked under Mr. Hill and Mr. Mitchum?

A. Yes, sir.

Q. Saturday is not a day of work for these railroad sections, is it?

A. No, sir. It is not.

Q. They are off on Saturday?

A. Yes, sir.

Mr. DOUGLAS MCKAY: Witness with you.

CROSS EXAMINATION

By Mr. EDEN:

Q. Did you write that?

A. Well, I can't say that I wrote it. I have a young man in the office. He might have typed it.

Q. Who dictated it?

A. I did.

Q. And who are who?

A. Roadmaster.

Q. And you are stationed where?

A. Charleston.

Q. And what territory was to be covered by this safety meeting in Florence?

A. The South District of the Northern Division, which includes from Parkton, N. C. to Savannah.

Q. The stop at Jacksonboro was supposed to be for the personnel of Mr. Hill's crew and who was the other fellow?

A. Mr. Mitchum at Jacksonboro and any of the laborers from the Walterboro branch. They could come over and go.

Q. I understood from opposing counsel's questions a while ago that the stop at Jacksonboro was for the purpose of picking up two section hand groups.

A. Any of the laborers who were there. They were all notified of the stop at Jacksonboro.

Q. Do you have any laborers around there except the ones that work on those two sections or crews?

A. We did have, yes, sir.

Q. Who?

A. Ben Mitchell.

Q. You had Ben Mitchell?

A. He lives at Jacksonboro, yes, sir.

Q. Well, he worked on a section crew?

A. The Charleston yard.

Q. And he was the only outsider; I mean the only employee who lived outside of the Jacksonboro area that was to be picked up that night?

A. Well, I don't know about that. The men from other sections could have gotten on there.

Q. Well, how many men did you have in that section that might have gotten on?

A. At that particular time, there were seven on each section at Jacksonboro and Adams Run.

Q. Jacksonboro and where?

A. Adams Run.

Q. And that was what the purpose of this stop was for?

A. To pick up the laborers from those sections; and any more of the other laborers on the district who cared to go there.

Q. Well, what other laborers that cared to go would live there?

A. Well, Ben worked in Charleston and he lived at Jacksonboro. And he boarded the train there and the Walterboro Branch Laborers, they could come over from Walterboro to Jacksonboro.

Q. Well, you had about a hundred percent attendance, didn't you?

A. No, sir.

Q. If you had 14 to sixteen. Of course one of them was dead and two or three others were in the hospital, but you would have had about a hundred percent attendance, wouldn't you?

A. We had a good attendance, but it wasn't a hundred percent.

The COURT: He is talking about from that area.

Q. (By Mr. Edens) From the Jacksonboro area. If some of them hadn't gotten killed and the rest of them put in the hospital, you would have had a hundred percent attendance?

A. No, sir.

Q. Well, about that, wouldn't you?

A. About.

The COURT: Who was absent?

The WITNESS: We had one man that I know of from the Adams Run section who was absent.

The COURT: Well, do you know of any others?

The WITNESS: No, sir.

The COURT: All right. That is outside of these people that got killed and injured.

The WITNESS: Well, there was not any of the employees from either section. In other words, didn't any of the men get on at Jacksonboro after the accident.

The COURT: Didn't any of them get on?

The WITNESS: No, sir—didn't any of them go.

The COURT: Didn't any of them go from that section?

The WITNESS: No, sir. None of them boarded the train after the accident.

The COURT: None of them went to the meeting after the accident?

The WITNESS: No, sir.

The COURT: All right.

Q. (By Mr. Edens) You say you dictated this notice?

A. I either wrote it in long hand and the boy copied it off or dictated it. I won't say positive.

Q. And, of course what your foreman told the laborers that worked under them, you don't know, do you?

A. No, sir.

Q. You have no way, I mean, you just don't know that?

A. No, sir.

Q. That's all. Come down.

Mr. DOUGLAS McKAY: Come down, Mr. Fowler.

Mr. Harold Mitchum was duly sworn.

DIRECT EXAMINATION

By Mr. DOUGLAS McKAY:

Q. Mr. Mitchum, in March, 1953, you were the section master at Adams Run, were you not?

A. Yes, sir.

Q. Did you receive this notice that has been put in evidence regarding the safety meeting at Florence?

The COURT: You mean that particular paper?

Mr. DOUGLAS McKAY: No, I mean a notice similar to that.

The COURT: Well, has he got his notice that he received?

Mr. DOUGLAS McKAY: I don't think he has.

The COURT: You might ask him. That would be the best evidence.

A. I received that, yes.

Q. (By Mr. Douglas McKay) Have you got the original that you received?

A. No, sir, not with me. I don't know whether I've got it at home or not.

Q. Well, pursuant to the information, or to the notice that you received, what did you do, as far as the men under you were concerned?

A. Well, I instructed them that we were having a safety meeting at Florence.

Mr. EDENS: It is what, if Your Honor pleases, he did with respect to any litigants in this case or their authorized representatives; not what he might have told somebody that is not involved in this litigation.

The COURT: It's what he told the section men themselves. Not what he told somebody else.

Mr. DOUGLAS MCKAY: What you told the gang.

The COURT: Well, the men themselves, not the gang. Did you give any instructions to the man that got killed; what was his name?

The WITNESS: He wasn't working for me, Your Honor.

The COURT: I understood he was working for you?

The WITNESS: No, sir.

The COURT: Well, who was working for you that are litigants in this case?

The WITNESS: LeRoy Smalls.

The COURT: LeRoy Smalls the only one?

The WITNESS: Yes, sir.

The COURT: Well, did you give any instructions to him, personally?

The WITNESS: No, sir. I gave it to the whole section. I told them about the meeting.

The COURT: You mean all of them were present?

The WITNESS: Yes, sir.

The COURT: And this Smalls fellow was present when you gave the instructions?

The WITNESS: Yes, sir.

The COURT: I think that would be competent. Go ahead.

Q. (By Mr. Douglas McKay) What did you tell them?

A. I told them about the safety meeting and I wanted to know the number that would attend. They were invited. They didn't have to go if they didn't want to but I wanted to know the ones that would go, and the ones that didn't have passes, the company would furnish a pass for them. We were going to have #376 stop at Jacksonboro and

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take them to Florence, and see if they couldn't stop #76 and let them off there on the way back that afternoon.

Q. State whether or not you told LeRoy Smalls or anybody else that they had to go?

A. No, sir. I did not.

Q. You had been to these meetings before, hadn't you?

A. Yes, sir.

Q. Purely voluntary, whether people go or not, isn't it?

A. Yes, sir.

Mr. EDENS: We submit that counsel ought to ask the questions of the witness.

The COURT: I think so. Don't lead him, Mr. McKay. Go ahead.

Q. (By Mr. Douglas McKay) What is the nature of those meetings; are they compulsory or voluntary?

A. Voluntary.

Q. Voluntary. State whether or not Saturday is a work day?

A. It is an off day.

Q. An off day?

A. Yes, sir.

Q. So, there is no work being done of your crew on Saturday?

A. No, sir.

Q. And no payment for going to these meetings, is there?

A. No, sir.

Q. Where were you at the time of this occurrence?

A. I was in Florence.

Q. You had gone on to Florence?

A. I went on #78 on the 27th, Friday afternoon.

Q. So, you had gone ahead of time?

A. Yes, sir.

Q. And did any of the men of your gang, after this thing occurred, come on to Florence for that meeting?

A. No, sir.

Q. State whether or not these men were paid any wages to go to Florence?

A. No, sir. They were not.

The COURT: He's already testified to that.

Mr. DOUGLAS MCKAY: Witness with you.

CROSS EXAMINATION

By Mr. EDENS:

Q. You would have paid them if they had gone on Friday, I suppose?

A. Well, I don't know. I mean, I imagine they would have, if they sent them during the working hours?

Q. So you sent them on Saturday so they wouldn't have to pay them?

A. The company didn't send them.

Q. What did they do?

A. They invited them to go.

Q. Apple pie and chicken and what else?

A. I don't think the letter said anything about that.

Q. Well, they didn't have no apple pie or chicken? You were there.

A. They had a fish stew.

Q. You mean they told them they were going to have chicken and other things and then gave them fish stew?

A. I didn't tell them that they were going to have it. Not on my section.

Q. Where do you live?

A. Adams Run.

Q. Sir?

A. Adams Run. Osborn is my post office.

Q. Sir?

A. Osborn is my post office.

Q. Why did you go on ahead and Mr. Hill wait behind?

A. I went on to visit some friends. And spent the week end with some friends in Florence.

Q. Mr. Hill lives right near that crossing, doesn't he, where the accident happened?

A. Yes.

Q. Pretty dark in March about 3:30 in the morning, down in Jacksonboro?

A. Yes, sir.

Q. Kinda cold about that time of morning, too?

A. Well, I imagine it is.

The COURT: Is there a station there at Jacksonboro?

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The WITNESS: There is a freight station, Your Honor.

The COURT: Freight station?

A. Yes, sir.

The COURT: How far is that from the crossing?

The WITNESS: About a hundred yards, sir.

The COURT: All right, go ahead.

Q. (By Mr. Edens) These safety meetings which you have, they are part of the program put on by the railroad?

A. Yes, sir, the railroad has them.

Q. It's put on under their supervision and immediate direction?

A. Yes, sir. I think so.

Q. And they pay for the fish stew? You didn't have to pay for the fish stew, did you?

A. We didn't. I don't know who paid for it.

Q. Well, you knew who paid for it, didn't you?

A. No, I didn't.

Q. You thought maybe the Community Chest paid for it, didn't you?

A. No. I didn't think about that.

Q. You had a pass or did they get special arrangements for your transportation?

A. I have a pass.

Q. You have a pass. And did you make arrangements about the other fellows on your crew who were going to get a pass?

A. I only had two that didn't have their own pass.

Q. And what did you do about them?

A. I wrote Mr. Fowler.

Q. You did what?

A. Wrote to Mr. Fowler, the roadmaster, and he had a pass on the train for them, or a wire I think, for the conductor to carry them.

Mr. EDENS: That's all.

RE-DIRECT EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. Mr. Edens seems worried about who paid for that fish stew.

Mr. EDENS: I ain't worried about it. I know.

Q. (By Mr. Douglas McKay) It was a pretty good fish stew, wasn't it?

A. I couldn't tell you about that, because I didn't stay for any of the fish stew.

Q. You are not a fish eating man. Well, that Florence fish stew has got a pretty good reputation for being good hasn't it, or do you know?

A. I don't know.

Mr. EDENS: I will give you an affidavit.

The COURT: Next witness.

Jeff Nesbitt was duly sworn.

DIRECT EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. Jeff, where do you live?

A. Parkers Ferry.

Q. At Parkers Ferry?

A. Yes, sir.

Q. Whom do you work under?

A. Mr. Mitchum.

Q. You work under Mr. Mitchum. You were a section hand for the Atlantic Coast Line Railroad Company under Mr. Mitchum?

A. Yes, sir.

Q. In March of 1953 weren't you?

A. Yes, sir.

Q. Who told you about the safety meeting at Florence?

A. Mr. Mitchum.

Q. Mr. Mitchum?

A. Yes, sir.

Q. What did he tell you?

Mr. EDENS: We object to what they told this fellow.

The COURT: What he told him wouldn't be competent.

Mr. DOUGLAS MCKAY: All right, Your Honor.

Q. (By Mr. Douglas McKay) Well, from what he told you, did you go to Jacksonboro, or what did you do on the early morning of the 28th?

A. Well, he told me, says the safety meeting—

Mr. EDENS: We object.

POOR COPY

The COURT: Wait a minute, you can't tell what he told you.

MR. DOUGLAS McKAY: Don't say what he told you, but from what he told you, what did you do?

The COURT: As a result of what he told you, what did you do?

The WITNESS: I went to Jacksonboro.

Q. (By Mr. Douglas McKay) What time of the morning did you get there?

A. About 3:30 I think.

Q. About 3:30?

A. I think that is right.

Q. Why did you go there?

A. Well, I went to go to Florence.

Q. For what?

A. The safety meeting.

Q. For the safety meeting?

A. Yes, sir.

Q. You had been to safety meetings before, hadn't you?

A. No, sir.

Q. You never had?

A. No, sir.

Q. The first one . . . how long had you been working for the railroad?

A. 7 years.

Q. 7 years?

A. Yes, sir.

Q. Had you ever been invited to go to one before?

MR. EDENS: We object.

A. Yes, sir.

The COURT: Wait a minute. Objection sustained. He hasn't stated he has been invited to one yet, and if he did, it wouldn't be competent. In other words, it's what happened to these plaintiffs is what we are trying here; not what happened to him.

MR. DOUGLAS McKAY: All right, Your Honor.

The COURT: Go ahead. He can tell what he saw there that night if he saw anything. I don't know whether he did or not.

Q. (By Mr. Douglas McKay) You have been working for them for seven years, you say?

A. Yes, sir.

Q. Why did you want to go or why did you go to this safety meeting or want to go to the safety meeting?

A. Well, I wasn't working that day and I thought I would go.

Q. Go to a new town?

A. Yes, sir.

Q. Now, Nesbitt, you say you got there early in the morning. Where did you go or stop after you got there in the neighborhood of Jacksonboro?

A. We went up and parked the car on the other side of the depot flag station and we came back to the crossing. And I and Albert was talking.

Q. You and Albert who?

A. Albert Downing?

A. Albert Downing?

A. Yes.

Q. You were talking?

A. Yes.

Q. Was it still dark?

A. Yes, sir.

Q. Did you say you went back to the roadway?

A. Yes, sir.

Q. About where were you standing in reference to the track and the highway when this accident happened that we are going to tell about?

A. I was standing on the north side of the crossing.

Q. North side of the railroad crossing?

A. Yes, sir.

Q. About how far from the railroad tracks?

A. About 50 feet, I guess.

Q. Were there any other laborers there at the time?

A. Yes, sir. I and Albert.

Q. You and Albert. And did you see any other one around?

A. Yes, sir. Some of them be around.

Q. About how far were you and Albert from the others?

POOR COPY

A. Well, we would be on one side of the crossing and they be on the other side.

Q. And they were on the other side?

The COURT: How many were there altogether?

The WITNESS: I just couldn't tell you how many. I can call their names.

The COURT: Well, about how many? Was it 13 or 14?

The WITNESS: About 13 or 14.

The COURT: Were both crews there?

The WITNESS: Yes, sir.

The COURT: All of both crews there?

The WITNESS: Yes, sir.

The COURT: Go ahead.

Q. (By Mr. Douglas McKay) But you and Albert were off on one side and the rest of them were on the other side, is that the way?

A. Yes, sir.

Q. Did you see this car come along the highway that ran over these people?

A. I didn't saw the car at all. I wasn't looking that way.

Q. Which way were you looking?

A. I was looking north, up the track.

Q. What was the first thing that attracted your attention that something had happened?

A. When I looked around, I seed he car how it drug them fellows across the railroad and they hollering.

Q. What made you look around?

A. I heard a noise.

Q. You heard a noise?

A. Yes.

Q. And then you heard people hollering?

A. Yes.

Q. What did the car that hit them do?

A. It kept going.

Q. Kept going?

A. Yes, sir.

Q. But after that, what did you and Albert do as regards the people that were hurt?

A. Well, we helped put them in the ambulance and sent them to the hospital.

Q. The train wasn't in sight at that time, was it?

A. No, sir, no sir.

Q. Well, when the train came, you all didn't go?

A. No, sir. We didn't go.

Q. Nobody got on?

A. No, sir.

The COURT: Did you stay there until the train came?

The WITNESS: Yes, sir.

The COURT: All right, go ahead.

Q. (By Mr. Douglas McKay) The train came before the ambulance came to take them off, didn't it?

A. That is right, yes, sir.

Q. And you all stayed and put them in the ambulance?

A. Yes, sir.

Mr. DOUGLAS MCKAY: Witness with you.

CROSS EXAMINATION

By Mr. EDENS:

Q. People used that road where that car came from?

A. Yes, sir.

Q. They live back up the river there?

A. Sir?

Q. They live back up the river, up that road where the car came from; people live all back there?

A. Oh, yes, sir.

Q. Got all kind of old cars. All kinds of old cars use that road?

A. Yes, sir.

Mr. EDENS: That's all.

RE-DIRECT EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. One more question. State whether or not you felt that you had to go to Florence.

The COURT: No.

Mr. EDENS: If Your Honor pleases, it's not a question of how he felt. We think the fact that he was there is about the best evidence.

The COURT: What?

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Mr. EDENS: We think that the fact that he was there is about the best evidence.

The COURT: No, I don't think that what instructions they gave him or how he felt about it; certainly how he felt about it wouldn't have anything to do with it because that would certainly be a conclusion.

Q. (By Mr. Douglas McKay) Well, Nesbitt, you are still working there, aren't you?

A. Yes, sir.

Q. And you have been working for them seven years, I believe you said?

A. Yes, sir.

Mr. DOUGLAS MCKAY: That's all.

The COURT: Go down. I think we had better take a recess now. We will recess until three o'clock. Gentlemen, be back at three o'clock.

WEDNESDAY AFTERNOON, FEBRUARY 24, 1954

(Jury Present.)

The COURT: All right, Gentlemen, proceed.

Albert Danner was duly sworn.

DIRECT EXAMINATION

By Mr. JULIUS MCKAY:

Q. Your name is Albert Danner?

A. Yes, sir, Albert Danner.

Q. By whom are you employed, Albert?

A. By whom am I employed?

Q. Who do you work for?

A. Mr. Hill.

A. Mr. Hill.

Q. Mr. Hill?

A. Yes, sir.

Q. And Mr. Hill works for the Coast Line?

A. Yes, sir.

Q. All right. Were you working for the Atlantic Coast Line Railroad on March 28, 1953?

A. Yes, sir.

Q. What capacity, what job, did you hold with the Coast Line, Albert?

A. Well, as a Section Hand.

Q. A section hand. Was Charlie Bright in your section?

A. Yes, sir. He was then.

Q. He was in your section?

A. Yes, sir.

Q. Were you present at the time Mr. Hill told you about going to Florence or told your section about going to Florence for this safety meeting?

A. Was I present?

Q. Yes.

A. Yes, sir.

Q. Was Charlie Bright present at that time?

A. Yes, sir. He was present.

Q. He was present at that time. Did Mr. Hill tell you that . . .

Mr. EDENS: We object, if Your Honor pleases. If he is going to go into a conversation, we submit the question should be what was the conversation.

The COURT: What did Mr. Hill tell you, if anything?

Q. (By Mr. Julius McKay) What did Mr. Hill tell you?

A. Well, he said that morning that there was a safety meeting in Florence and who wanted to go was welcome and the train would stop and pick us up.

Q. Did he tell you where the train would stop to pick you up?

A. No, sir. He had no particular place where it would stop at but he said it would be at Jacksonboro.

Q. He said it would be at Jacksonboro?

A. Yes, sir.

Q. Did he tell you you had to go?

A. No, sir. He didn't say we had to go.

Q. All right. Did you go to Jacksonboro on that morning, on the 28th, Saturday morning it was?

A. Yes, sir. I live right there, you know.

Q. You live right there?

A. Well, it's not so far.

Q. All right. And did you go up to the crossing early that morning?

A. Yes, sir.

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Q. All right. When you got there, who did you see standing there?

A. When I got to the crossing; let me see . . . Well, I met two or three of the boys, you know, before I get there and start talking to two or three of them.

Q. On which side of the crossing were you standing?

A. Well, on the east side.

Q. On the east side. All right. Did you see this automobile that struck Ben Mitchel and Charlie Bright before the accident?

A. Well, I couldn't exactly see. But what I mean, we was, you know a good space from it?

Q. All right. Did it have its lights on when you saw it?

A. Yes, sir.

Q. It had its lights on?

A. No, the lights was put on, about, Oh, I reckon about a hundred yards from the crossing.

Q. The lights were put on about a hundred yards before the crossing?

A. From the crossing.

Q. All right. And did you see the automobile when it struck Ben Mitchel and Charlie Bright?

A. Well, you couldn't hardly see it at night. But you could see when . . . What I mean, after it happened I seed then.

Q. All right. Did you notice the path that the automobile took? Did you notice it swerve to the left?

A. Well, I didn't hardly see when it swerved, you know, but the way he turned in the night time; you can't tell where a car is going to turn so much at night but maybe if you go and look afterwards you can see.

Q. All right. Did you help put these men in the ambulance after they were injured?

A. Well, it was one of them lying there that we helped in, but not but just one of them.

Q. You helped with one?

A. Just one.

Q. All right. Did the automobile stop after it struck these 3 men?

A. No, sir, it didn't stop.

Q. And do you know who was in the automobile or did you know at the time who was in the automobile?

A. No, sir.

Q. All right. Did you go on to Florence for the Safety Meeting after this accident?

A. No, sir. None of us didn't go then after it happened.

Mr. JULIUS MCKAY: All right. Witness with you. Answer any questions Mr. Edens might have.

CROSS EXAMINATION

By Mr. EDENS:

Q. The train came before the ambulances got there to take these people to the hospital, didn't it?

A. When? You mean did the train come before the ambulance?

Q. Yes. The train came and went on before the ambulance got there?

A. Yes, sir, the train came before the ambulance.

Q. And all you boys were around there trying to take care of these people that were hit by the car?

A. Well, hadn't none of us leaved yet.

Q. Well, I say, you all were doing anything you could do to help these fellows that had been hit by the car?

A. Oh, yes, sir.

Q. The car; you didn't see it approach that crossing before it hit? You didn't notice the car until it hit these people?

A. Well, when I noticed the car, it was done hit. Well, I seen the lights but I thought probably he was just blinking for a crossing light, but when I seed it, he was done hit and gone.

Q. Well, you didn't notice the car until it hit these people?

A. No, sir. I noticed the car before that, but what I mean. I didn't think nothing about there was a car coming until it hit and then I noticed then.

Q. You didn't think the car was coming on across the crossing until it started hitting these people?

A. No, sir, not with that speed.

The COURT: Not with what?

The WITNESS: I didn't think the car would come on across. I didn't think so.

Q. (By Mr. Edens) It wasn't going very fast, was it?

A. Oh, I reckon that car be making about, well, I couldn't guess in the night.

Q. Well, I say it wasn't going very fast?

A. He had a pretty good speed though, sir.

Q. Well, you just said you didn't think though when you saw it that it was coming on across the crossing with the speed it had. Isn't that what you said?

A. Yes, sir, but the average car, you wouldn't know where it is going to stop at, if you are just out there looking?

Q. Now, where was it you say all you boys were when Mr. Hill told you about the safety meeting?

A. At the tool house.

Q. You were where?

A. He told us that morning at the tool house.

Q. Say that again.

A. At the tool house.

Q. And where is the tool house?

A. About four hundred yards from the crossing.

Q. From the crossing.

A. Yes, sir.

Q. Well now, wasn't anything said about the safety meeting anymore after that time?

A. Yes, sir.

Q. Well, now, when you say yes sir, what do you mean, yes or no?

A. Yes, sir, if anything was said more about it after that.

Q. Didn't say no more about it?

A. I say yes sir, he did say some more about it.

Q. He did talk some more about it?

A. Yes, sir.

Q. And whenever he would talk about it, he would get all of you together?

A. Well, he talked about it at that morning when he had us all together and the next morning he told us how to get there.

Q. The next morning he told you how to get there?

A. Yes, sir.

Q. And how did he say to get there?

A. Well, the train would stop and pick us up.

Q. The train would stop and pick you up at the crossing?

A. No, sir. He didn't say at the crossing, but he said the train would stop and pick us up.

Q. I see. So you all just guessed where the train was going to pick you up?

A. Well, the train usually stopped; the train usually stops between the crossing and, well right along in there.

Q. Right along there?

A. But he didn't say where it would be at.

Q. But that's where you all happened to be at?

A. No, sir.

Q. That is the first place you went, was to the crossing?

A. Yes, sir, that is the crossing on the road in the highway and we stopped there. I stopped there myself.

Q. That's what you did?

A. Yes, sir, and all the rest of them were right there.

Q. And you didn't have any lunch with you either?

A. No, sir.

Q. They told you about the chicken pie and pork chops and apple pie?

A. I don't remember that part.

Q. You didn't take anything with you?

A. No, sir. I didn't take anything with me.

Q. What did they tell you they were going to give you to eat? They didn't tell you anything about that they were going to feed you, did they, or did they?

A. I don't remember that, no, sir.

Q. You mean you remember about inviting you to go and you forgot all about the pork chops and the apple pie and fried chicken?

A. No, sir, but, I don't remember telling about the food or nothing, but I did remember that inviting us to go.

Q. How close did the car come to hitting you?

POOR COPY

A. I was standing out of the way of the crossing on the right side going this way, and on the east side coming the other way.

Q. Well, the car went across the crossing on the other side of the crossing from where you happened to be standing?

A. Yes, sir. The car went across the crossing on the other side.

Q. I believe there were four people hit?

A. Yes, sir. There were four.

Q. Anybody hit besides those four?

A. No, sir. Not that particular time.

Q. Well, do they get hit pretty often there?

A. That's the first time anything ever happened on that crossing there.

Q. You said not at that particular time. I just wondered if anybody got hit before or since that same way?

A. No, sir. No, sir, not that way.

Q. Well, which way are you talking about somebody getting hit?

A. What I mean, you said; I can't understand you now, though, sir.

Q. That's all right. What do you do?

A. Well . . .

Q. You do the same kind of job that LeRoy Smalls did?

A. Yes, sir. Section laborer or section hand.

Q. Which section hand are you on? Which foreman do you work under?

A. Mr. Hill.

Q. That the same one LeRoy Smalls works under?

A. No, sir.

Q. The same one that Charlie Bright worked under?

A. Yes, sir.

Q. Charlie Bright; was he a good worker before he got in this accident?

A. Yes, sir, I believe he was but, I mean, we all worked together, right there.

Q. He could tote his load all right before he got hurt, couldn't he?

A. Yes, sir, I expect, yes, sir.

Q. Well, you know; you worked with him.

A. Yes, sir. He could work all right before he got hurt.

Q. Can he do any work now? You have been seeing him around there. Can he do any work now?

A. Well, I don't know sir, whether he could or not. I haven't seen him working none. I have been seeing him but I haven't seen him working since. No more than pass by sometimes. I see him sitting on the porch but I ain't never seen him do no work, not since then.

Q. Do you ever see LeRoy Smalls around there?

A. I see him too.

Q. Do you see him doing any work around?

A. Well, no more than a little bit. I think he was working at a mill one time.

Q. Well, you heard him testify about that, I asked you if you saw him doing anything?

A. No, sir. I didn't see him. Well, most of the jobs don't work but five days a week. And some four days. When I'm off, everybody else is off at the same time, you see. I can't tell how he works. If I was working on a job with him, I could tell you.

Q. Well, he lives right in the same neighborhood you live in?

A. Yes, sir.

Q. And how were you going to get to Florence? Did you have a pass?

A. No, sir.

Q. Who arranged about your pass?

A. Mr. Hill arranged for the pass.

Q. How did you know what he had done about your pass or about your transportation?

A. Well, he said that morning.

Q. He said what morning?

A. He said the morning he told us about the trip, that the train would stop and pick us up and that the pass would be on the train.

Q. Would be on the train?

A. Yes, sir.

BLEED THROUGH POOR COPY

Q. And that morning when he told you all about this safety conference and the dinner and all, he made arrangements then for everybody to be there, didn't he?

A. No, sir, he said . . .

Q. I didn't ask you what he said. Everybody was going after he talked to you, weren't they?

A. Yes, sir. We started.

Q. It's pretty good business in the job you have got to do whatever Mr. Hill wants you to do, isn't it?

A. How you mean, sir?

Q. Did you hear my question?

A. Sir?

Q. You work for Mr. Hill, don't you?

A. Yes, sir.

Q. You find it's a pretty good thing for you to do what he wants you to do, don't you? Do you understand my question?

A. No, sir, what I mean, well, if he working, so as far as the job is concerned, when you are working out some place, you work on the job.

Q. All right.

The COURT: Anything further of this witness?

RE-DIRECT EXAMINATION

By Mr. JULIUS MCKAY:

Q. Just one or two short questions; Albert, do you work on Saturday?

A. No, sir.

Q. Were you going to be paid to go to Florence for this safety meeting?

A. No, sir. I was supposed to be free, I guess.

Mr. JULIUS MCKAY: All right, that's all. Anything further?

Mr. EDENS: No.

The COURT: What was going to be free?

The WITNESS: Well, a free trip.

Q. (By Mr. Julius McKay) They weren't going to pay you your wages on Saturday for going there, were they?

A. No, sir. Not to go there.

Q. You were going to be free too then?

A. Yes, sir.

Mr. JULIUS MCKAY: Come on down Albert. That's all.

The COURT: Next witness.

Mr. DOUGLAS MCKAY: May it please the Court, the plaintiff took depositions at Walterboro of certain witnesses. They haven't offered their testimony in evidence and I should like to offer it in.

The COURT: All right.

Mr. DOUGLAS MCKAY: With the exception, Mr. Hill is here. I won't offer his testimony because he is here in person. But all except Mr. Hill's testimony was taken in Walterboro and I would like to offer it.

(Depositions printed at end of Transcript of Trial.)

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Mr. W. L. Hill was duly sworn.

DIRECT EXAMINATION

By Mr. DOUGLAS MCKAY:

Q. Mr. Hill, you were in March, 1953, and are now with the section master living at Jacksonboro for the Atlantic Coast Line Railroad Company, are you not?

A. Yes, sir.

Q. How long have you been section master?

A. I have been section master ever since 1929.

Q. Since 1929. Now, Mr. Hill, of these men that were injured, three of them suing here, one dead, which one was in your gang?

A. Charlie Bright.

Q. Charlie Bright. He was the last witness for the other side?

A. Yes, sir.

Q. Mr. Hill, Mr. Fowler has testified and put in evidence the notice that he sent out. You are foreman; they call you section foremen, I believe?

A. Yes, sir.

Q. About this safety meeting to be held at Florence on March 28th, 1954. Did you get a notice?

A. Yes, sir. I did.

Q. Pursuant to that notice, what did you do and to whom did you tell?

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A. I told the laborers working on my section that the railroad was having the safety meeting in Florence and they was invited to go and I would be glad for them to go. If they would go, they would furnish them transportation and give them dinner.

Q. Was Charlie Bright in the crowd when you told them that.

A. Yes, sir. He was at the toolhouse when I told them that.

Q. What did you advise them about catching the train?

A. Well, I told them the train; the roadmaster had wrote me and said he would have the train stop there and pick them up and he would have transportation on there for them.

Q. Some of the men had passes, didn't they?

A. Yes, sir.

Q. And did you procure the names of those who didn't?

A. No, sir. He came over a day or two before that and I told him the ones that was going.

Q. You told him the ones that were going?

A. Yes, sir.

Q. Now, Mr. Hill, had you been to any of these meetings before?

A. Yes, sir. I have been.

Q. What is the purpose of the meetings?

A. Well, it is safety, to teach us about working safely and handling our tools in the proper manner and having safe working tools and safe operation of motor cars, and observing of road crossings and things like that, sir.

Q. State whether or not it is sort of educational to promote safety on the railroad for the men and for the public and for the company?

The COURT: What did you say about the railroad crossing? I didn't quite understand you.

Mr. DOUGLAS MCKAY: Maintaining, you know, watching out for anything around a railroad crossing or anything, Judge.

The COURT: All right.

Mr. DOUGLAS MCKAY: Like motor cars we have. You know, be on the look out around road crossings and such as that.

The COURT: All right. Go ahead.

Q. (By Mr. Douglas McKay) Well, now, on this occasion, was there any compulsion whatever about the men going?

A. No, sir.

Q. Mr. Hill, just go ahead and tell what you did that morning? About your getting up early and what the situation was up to the time of the accident.

A. Well, I got up early and come out there and called the dispatcher at Charleston and asked him was the train on time and he said no, it was a few minutes late, and I went back in the house for a few minutes and Cal Ott and I walked across the track. The accident occurred at the road crossing.

Q. Just one minute. Let's' get you located. Where is your house in reference to the station there?

A. Opposite it.

Q. Just opposite it?

A. Just opposite the freight station, sir.

Q. About a hundred yards or so away from the freight station?

A. A hundred yards south of the highway crossing.

Q. South of the highway crossing?

A. Yes, sir.

Q. And where were you when this car came along and ran into these men?

A. I was on the east side of the north bound main line there, sir.

Q. Did you see it?

A. No, sir.

Q. What first attracted your attention?

A. I heard the racket there and I looked and then I saw the car.

Q. Where were you standing at that time?

A. I was standing over on the opposite side of the track from my house, right next to the old freight station, sir.

Q. I see. And the noise attracted your attention?

A. Yes, sir.

Q. Just what did you do?

A. Well, I went right on up there at the crossing and saw who was hurt and everything and I went across to a neighbor there and got him to call the sheriff and the ambulance to come get them.

Q. How many men were hurt?

A. Four.

Q. Four. And one of them afterwards died, didn't he; Mitchel?

A. Yes, sir.

Q. What happened to the driver? What did the driver of that car that came dashing along there do?

A. I don't know.

Q. Did he stop?

Mr. EDENS: Hadn't anybody said the car dashed along there.

Q. (By Mr. Douglas McKay): I mean that night. Did he stop or not?

A. No, sir. He did not stop.

Q. He drove on off?

A. Yes, sir.

Q. You don't know where he is now or anything about him, do you?

A. No, sir. I do not.

Q. Were you there when the highway patrolman came?

A. Yes, sir.

Q. And the others. You did what you could to get them to make them comfortable?

A. Yes, sir. I did.

Q. And they were carried off in an ambulance?

A. Yes, sir.

Q. Did you take the train and go on to Florence or did you forego the trip?

A. No, sir. I did not go to Florence, sir.

Q. None of the group that were there went to Florence?

A. No, sir.

Q. The trains along there, particularly a train of this kind, #367 I believe, when they stop, where do the passenger coaches stop as a general thing?

A. Generally, it stops about opposite the old station, between there and the crossing.

Q. Yes, between the old station and the crossing?

A. Yes.

Q. Depending on the length of the train. Would that make any difference as to where the passenger coaches would stop?

A. Well, not exactly, no, sir.

Q. Usually between the station and the crossing?

A. Yes, sir.

Q. State whether or not you told any of the men to wait at the crossing?

A. No, sir. I did not tell them where to wait.

Mr. DOUGLAS MCKAY: Witness with you, Mr. Edens.

CROSS EXAMINATION

By Mr. EDENS:

Q. Mr. Hill, all those people there that night were under your direct supervision, weren't they?

A. No, sir.

Q. Well, you certainly; anything you told them to do, they would have done it, wouldn't they?

A. Well, I don't know, but they was not under my supervision because they was not even working for me, sir.

Q. Well, the men that were in your crew were there, weren't they?

A. Yes, sir.

Q. And you say that usually the passenger cars stop at the station?

A. Around the station.

Q. Stops around the station?

A. That is right.

Q. Now that train which you were going to stop was what train?

A. Number 376.

Q. Isn't that one of your fast passenger trains that run around 80 and 90 miles an hour regularly?

BLEED THROUGH POOR COPY

A. Something like that, between 70 and 75 miles an hour.

Q. And they have a real tight schedule to keep up with, don't they?

A. Yes, sir.

Q. And that is not a regular stop?

A. No.

Q. And this wouldn't have been on the program, them stopping there that night; that would throw them behind schedule, wouldn't it?

A. Well, he could have made them few minutes up, sir.

Q. And I believe the information you got was that that train was already a little bit late?

A. That's what they told me, yes.

Q. And stopping there would have made it a little more late, wouldn't it?

A. Yes, sir. If he hadn't made the time up, it would have.

Q. There is no light at the crossing, I don't think, is there?

A. No, sir.

Q. Is there any light at the station?

A. No, sir.

Q. That is purely a flag stop, isn't it, Mr. Hill?

A. Yes, sir, it is a flag stop.

Mr. DOUGLAS MCKAY: That's all, thank you. That's the defendant's case, Your Honor.

The COURT: Anything in reply?

Mr. EDENS: I just want to call attention to the mortuary table which The Court will take judicial notice of. That, at 32, the expectancy is 36 and at 42, it is 27.

The COURT: Well, let's see. Which plaintiffs? Give me the ages of the plaintiffs.

Mr. EDENS: The deceased was 32 years of age. The plaintiff LeRoy Smalls was 32 and the plaintiff Charlie Bright was 42.

The COURT: All right.

Mr. EDENS: Charlie Bright is the one who had the abdominal operation subsequent to the accident.

The COURT: All right, sir.

Mr. DOUGLAS MCKAY: May it please The Court, we have a motion to make.

The COURT: All right. Gentlemen of the jury, go to your jury room and rest a little, while I hear some questions of law.

(The jury retired from within hearing of the court-room.)

The COURT: All right, go ahead.

Mr. DOUGLAS MCKAY: May it please The Court, at this stage of the case, we move for a direction of verdict on the following grounds: First, that there is not sufficient evidence of actionable negligence to warrant the issue to be submitted to the jury. I don't believe willful negligence is being claimed in the case. So I will not make a motion as to that

The COURT: I think he alleges willful negligence. Didn't you?

Mr. EDENS: Yes, sir.

Mr. DOUGLAS MCKAY: Well then, I move that it be directed that there is no evidence for punitive damages.

Mr. EDENS: We will withdraw the willful negligence, Your Honor.

The COURT: All right.

Mr. DOUGLAS MCKAY: Now, Your Honor, we further move for a direction of verdict on the ground that the only reasonable inference to be drawn from the testimony is that these injuries were caused by the reckless and criminal negligence of a third party who drove his car into these men standing at or near the roadway. And that that was an incident for which the railroad company is not responsible and which it could not have in any way foreseen. And, I think that, on the ground that the act of a third party being the actual and direct cause of these injuries, that a verdict should be directed in our favor.

The COURT: All right, sir. In this case of course in passing upon such a motion, I have to take the testimony most favorable to the plaintiff.

Mr. DOUGLAS MCKAY: Yes, sir.

The COURT: It appears in this case from the plaintiffs' testimony that they were directed to be at the railroad

POOR COPY

crossing to take the train to Florence to go to a safety meeting, the employees of the Atlantic Coast Line Railroad Company, and they were directed to take the train at the crossing. It appears that there is a freight depot there. It is unlighted according to the testimony developed. Now, there were no lights at the crossing of any kind whatsoever, and I think it would be a question for the jury as to whether or not that would be furnishing a reasonably safe place for these men to gather to take this train under such conditions. As to whether they were employees of the railway company at the time of the accident, it is my view that they were going to this meeting, at the most at the request; the plaintiffs testified upon the orders, of the railway company, and they were going for the benefit of the railroad company, at a safety meeting. And in my opinion, they were employees of the railroad company at the time they were injured, and at the time one of the plaintiffs was killed. For those reasons, briefly stated, I think it is a question for the jury as to whether or not the defendant furnished the plaintiffs a reasonably safe place to work and I will submit that question to the jury.

Mr. DOUGLAS MCKAY: May I add, Your Honor, for the record, one ground to my motion?

The COURT: All right.

Mr. DOUGLAS MCKAY: And that is I also move for a dismissal or a direction of verdict on the ground that at the time these plaintiffs were not engaged in interstate commerce.

The COURT: I understand. Well, in my opinion, since they were section hands, they were employees of the railroad company, engaged in interstate commerce, and they were ordered or requested or asked; in any event, they would still be going at the suggestion or request or the orders of the railway company to a meeting had for the benefit of the railway company and, as such, for benefit of them as section man, and as section men, they are certainly engaged in interstate commerce. All right. Bring in the jury.

(The jury was returned to the courtroom.)

The COURT: In other words, they were required or requested to meet a train there at night with no lights whatsoever. It's a question for the jury as to whether or not they furnished a safe place under the decisions of the Supreme Court, by which I am bound. How much time do you want to argue this case for the plaintiff?

Mr. EDEN: Your Honor, I think 30 minutes.

The COURT: All right. How much for the defendant?

Mr. DOUGLAS McKAY: Thirty will certainly be enough for us, sir.

The COURT: All right. I will give 30 minutes to the side.

Mr. DOUGLAS McKAY: Your Honor, as I understand, the rule in Federal Court is that the plaintiff opens in full.

The COURT: That is correct.

The COURT: All right, proceed with the arguments.

(Mr. Edens argued to the Jury in behalf of the Plaintiffs.)

(Mr. Douglas McKay argued to the Jury in behalf of the Defendant.)

(Mr. Edens argued to the Jury in behalf of the Plaintiffs in reply.)

The COURT: Gentlemen, I have been thinking about this contributory negligence. Where is there any contributory negligence?

Mr. DOUGLAS McKAY: I think there is none, Your Honor. We withdraw it.

The COURT: All right. Gentlemen, we will take a recess until ten o'clock in the morning.

THURSDAY MORNING, FEBRUARY 25, 1954

(In chambers, not in the presence of the jury.)

The COURT: Go ahead, Mr. McKay.

Mr. DOUGLAS McKAY: Your Honor, I wish to add another ground to my motion for a direction of verdict.

The COURT: All right, sir.

Mr. DOUGLAS McKAY: And that is that at the time of the injuries the plaintiffs were not actually in the employ of the defendant and that a verdict should be directed on that ground.

The COURT: Very well.

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Mr. DOUGLAS MCKAY: And just one other, Your Honor: And that the evidence showed that we had provided them with a safe place.

The COURT: Very well. The same ruling on those grounds, Mr. McKay. Let the record so show.

(In the Court Room with the jury present.)

The COURT: Mr. Foreman and Gentlemen of the Jury, you have heard the testimony in this case. You have heard the able arguments of counsel for the plaintiff and counsel for the defendant. It now becomes my duty to charge you or instruct you concerning the law to be applied in these cases, because there are three cases being tried together.

In these cases, I charge you at the outset you are the sole judges of the facts and the credibility of the witnesses. It is for you to determine which witnesses you believe and which witnesses you disbelieve. In determining that question, you have a right to take into consideration what interest, if any, the witness whose testimony you have under consideration may have in the outcome of this controversy, or any other facts or circumstances surrounding the testimony of the witness you have under consideration; his manner upon the witness stand, his attempts, if any, to evade questions, his refusal to answer questions directly, or any other fact or circumstance surrounding the testimony of the witness you have under consideration. Just use your common sense and determine what weight, if any, you should give to such witness' testimony.

However in these cases, as to the law of the cases, you are sworn to take the law as I give it to you whether you think it is good law or whether you think it is bad law. If I make a mistake in that law, there is another court that will correct that mistake. You take the law as I give it to you and apply it to the facts as you find them to be and then you find your verdict in that way.

You sit as twelve judges of the facts just as I sit as one judge of the law. It is your duty to give the plaintiffs and the defendant a fair and impartial trial according to the law as I give it to you and according to the facts as you find them to be.

At the outset, before any of these plaintiffs can recover a verdict at your hands, the burden is upon them to prove the material allegations of their complaints by the greater weight or preponderance of the evidence. That is, by the evidence that weighs heavier with you. If it evenly balances, then the plaintiffs have failed to carry the burden. If the plaintiff's evidence outweighs the testimony for the defendant or in favor of the defendant in the slightest degree, then the plaintiffs have carried the burden imposed upon them by law.

Now, as I said at the outset, by consent of the parties, these three cases have been consolidated for trial. That is, we are trying three cases at the same time. The testimony you have heard applies where applicable to all three cases. For instance, you take the testimony of each plaintiff and such plaintiff's testimony applies to all three cases. You take the testimony of the defendant; the testimony of the defendant applies to all three cases, the different witnesses. As a matter of fact, I think the testimony with the exception of the measure of damages applies to all cases. I think that is about the only exception, as to the measure of damages. Of course, the measure of damages is different in the three cases. I will charge you about that later in my charge, as to what, if you decide for the plaintiffs; what the measure of damages should be.

Now, the first case I will talk to you about is the case of Eva G. Mitchel as Administratrix of the estate of her husband Benjamin Mitchel against the Atlantic Coast Line Railroad Company. And, the law I charge you in that case applies with equal force to the other two cases except as to the measure of damages.

Now, this case is brought by her against the defendant railway company under a Federal Statute. That is, an Act passed by the Congress of the United States, commonly known as the Federal Employers Liability Act, which is as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or

Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." That means such railroad. I don't think the rest of the Statute applies here, because that is the safety part of it. That is the Safety Act. That is the safety of the appliances. I mean, there is no question about the appliances involved in this controversy.

Now, I charge you in connection with that Statute, that the Atlantic Coast Line Railway Company, at the time of these injuries and at the time of the death of this plaintiff's intestate, was a common carrier by railroad as contemplated by the Act and it was engaged in commerce between the several states, and that plaintiff's intestate was employed by the Atlantic Coast Line Railroad Company in interstate commerce at the time he received his injuries which caused his death, and the other plaintiffs were employed in interstate commerce at the time they received their injuries.

And, I charge you that this action—that is, the plaintiff's intestate's action we call it—is brought by the widow as administratrix and is brought for the benefit of the surviving widow and children as contemplated by the Act.

So, you see, the only thing that is left for your consideration in this case is did the plaintiff's intestate's injuries—that is the dead man's injuries—did his injuries and death, or did the injuries from which he died later result in whole or in part from the negligence of any of the officers, agents or employees of the Atlantic Coast Line Railroad Company. Now, that is the main point in the case. And, as far as the other two plaintiffs are concerned, did their injuries result in whole or in part from the negligence

of any of the officers, agents, or employees of the Atlantic Coast Line Railroad Company. That is the real question in issue in this case. That is the special inquiry you have to make. That is, did his injuries, as far as the dead man is concerned, and dea'a, result in whole or in part from the negligence of any of the officers, agents, or employees of the Atlantic Coast Line Railroad Company.

Therefore, the first thing you will want to know is what is meant by negligence. I charge you that negligence is the want of due care; negligence is the failure to observe due care. Negligence means the failure to do that which a person of ordinary care and prudence would have done under similar circumstances, or doing what a person of ordinary care and prudence would not have done under similar circumstances. You see, the law does not erect as the test the most careful or the most prudent man, or the least careful or least prudent man, but a man of ordinary care and prudence. Not the most careful man or the least careful man, but a man of ordinary care and prudence, is the standard erected by the law.

Negligence therefore is either negative or positive. It is an act of omission or an act of commission. That is, what a person of ordinary care and prudence would have done or would not have done under similar circumstances or similar conditions, or what a person or corporation would have done or would not have done under similar facts and circumstances or similar conditions. Corporations, of course, are fictitious persons. They can only act through their officers, agents and servants.

Now, in this case, even though the Atlantic Coast Line Railroad Company was negligent, that is not enough. The plaintiff must go further and prove that that negligence was the proximate cause of plaintiff's intestate's injuries and death, and of the other two plaintiffs' injuries in their cases. Therefore, the next thing you will wish to know is what is meant by proximate cause. Proximate cause means the direct cause, the immediate cause, although not necessarily the cause nearest in point of time. The efficient cause, the particular cause without which plaintiff's husband's injuries and death would not have occurred or the other plain-

tiffs' injuries would not have happened. The proximate cause of his death or injuries is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the death or injury and without which the death or injury would not have occurred.

Now, in these cases—that is, in all three cases—I charge you it was the duty of the defendant Atlantic Coast Line Railroad Company to use reasonable care to furnish its employees a reasonably safe place to work. This duty becomes more imperative as the risk increases, and less imperative as the risk is reduced. In all cases, it is a question of reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery. There is no evidence of failure of machinery in this case, however.

Now, in that connection, I charge you that the master—that is, the Atlantic Coast Line Railroad Company—is not the insurer of his employee's safety. It is not required to furnish them with an absolutely safe place to work, but only to use reasonable care to provide them a reasonably safe place to work. In other words, the railroad company doesn't guarantee a safe place for its employees to work; it is not required to guarantee a safe place for them to work, but to use reasonable care to furnish them a reasonably safe place to work.

I charge you in the plaintiff's intestate's case and as to the other plaintiffs cases, the testimony shows they were going to a safety meeting in the business of the defendant Atlantic Coast Line Railroad Company. Whether they were paid for going to the meeting or not, they were still going as section hands of the Atlantic Coast Line Railroad Company and as employees of the Atlantic Coast Line Railroad Company in the business of the defendant Atlantic Coast Line Railroad Company. The question for you to determine then is did the defendant Atlantic Coast Line Railroad Company furnish plaintiff's intestate and the other two plaintiffs a reasonably safe place in which to make the trip to Florence, South Carolina in the business of the defendant railroad company. Now, that is the main question in this case. When it boils down, that is the real question for

you to determine. I think that is about all the law on this part of the case. And, I say, the law I charge you applies to all three cases with equal force.

Now, if you decide that the plaintiff Eva G. Mitchel as Administratrix of the estate of Benjamin Mitchel is entitled to recover, then the next thing you will want to know is what is the measure of damages that should be awarded. That is, what are her actual damages? How do you arrive at what are actual damages, the damages to which the widow and children are entitled to in this case? That is, the plaintiff's intestate's case where the man died. They are two-fold: (1) the actual pain, suffering and mental anguish endured by Benjamin Mitchel during his life time between the time of his injuries and the time of his death. (2) The pecuniary loss suffered by the widow and the children by reason of the death of Benjamin Mitchel.

And, in determining the pecuniary loss suffered by the widow and the children, you may take into consideration the amount of money the deceased would have contributed for the benefit of his wife and children during his normal expectancy of life, which, under the mortuary table is 36.01 years, and the care, guidance and instruction and attention which he would have provided for his children during his life expectancy, and also his hospital bills she had to pay and the funeral expenses she had to pay.

Now, in connection with the mortuary table, or the mortality table as it is sometimes called, I charge you as follows: In attempting to arrive at what would be a proper amount to award, you would have the right to consider what is commonly called the mortuary table. Now, this applies to all three cases, all three plaintiffs. That table is not anything except a table that has been evolved out of the experience of life insurance companies.

It has been ascertained with a marked degree of accuracy that if you take a large number of persons who represent a certain age, that they have an expectancy of living for so many more years. There is no certainty as to that, however. The insurance companies don't guarantee you are going to live that long. In other words, because the expectancy table says you are going to live fifty more years does

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not mean that you are going to live that long, but it is what is called one's expectancy. You are expected to live that long. That is how long one is expected to live as calculated by such tables. You have a right to take into consideration the normal expectancy of life in arriving at what would be the amount to award in these cases. In the case of Eva G. Mitchel as the Administratrix, her deceased husband was 32 years old and his expectancy was 36.01 years.

Now, in considering this mortuary table, as argued by counsel for the defendant, there are many things you can take into consideration. You may take into consideration the fact that plaintiff's intestate was employed in more or less a hazardous occupation. You may take into consideration the likelihood of people to contract diseases at some time and take them away sooner than expected. You have a right to take into consideration that he may be killed by an accident sometime later on the highway or somewhere else. There is nothing certain about it. All those things are things which you may consider in arriving at an award in these cases.

In other words, there is no mathematical standard whereby you can arrive at an award. The damages cannot be measured by a yardstick. The jurors have to use their common sense and the things they have learned from life in trying to arrive at what is a proper and fair verdict in the event you determine to find a verdict for the plaintiffs.

Now, I charge you the measure of damages, if you decide that the other two plaintiffs, LeRoy Smalls and Charles Bright, are entitled to recover, are as follows: If you find the plaintiffs LeRoy Smalls and Charles Bright are entitled to recover, you should award actual damages; that is, such damages as were naturally the consequences of their injuries. They would be entitled to recover for any pecuniary loss they suffered, any pain and suffering they endured, mental anguish, doctors and hospital bills, loss of time, loss of earnings, loss of earnings they may suffer in the future, of pain and suffering they may sustain in the future, if you conclude they have been permanently injured as alleged in the complaints. They are entitled to recover compensatory demages in proportion to the character

and extent of the injuries plaintiffs have suffered and such as will fairly and adequately compensate them for such injuries.

It is proper to take into consideration physical and mental pain endured, expenses incurred for the necessary medical treatment, loss of time and income which has resulted or may result in the future, impairment of ability to work and earn a livelihood, the character of the injuries, and the amount that would make the injured parties whole as respects any permanent injuries. In addition thereto, it is proper to take into consideration such pain and suffering as it is reasonably certain will of necessity result in the future from their injuries.

And, in attempting to arrive at what would be a proper amount to award, if you conclude the plaintiffs are entitled to recover, you have a right to consider the mortuary table I have already read to you. Now, in the case of LeRoy Smalls, at the time of his injury, he was 32 years old and his expectancy was 36.01 years. In the case of Charles Bright, he was 42 years old and his expectancy is 27.62 years.

Now, in this case, in all three cases, the defendant has requested me to charge you certain propositions of law, some of which I charge and some of which I refuse.

I charge you that if in considering the question of safe place to work you should find the railroad furnished a safe place and that the plaintiffs voluntarily placed themselves in an unsafe place and thereby injuries were suffered without negligence on the railroad's part your verdict should be for the railroad.

I charge you that the railroad company cannot be held liable if you should find the plaintiffs in this case were solely negligent in placing themselves in a place of danger where injuries resulted when at hand, there was furnished by defendant an available safe place where injuries would not have resulted.

I charge you that. I refuse your number three, Mr. McKay, and I refuse your number four. I allow you exceptions on both of them:

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Mr. DOUGLAS MCKAY: Your Honor, in Number 5, there is a phrase, the cause of such injuries. I wish to insert there "directly"; must directly result. I have it noted I thought I had it on the original.

The COURT: Well, I will read it. "A railroad is not an insurer of the safety of its employees, and if the employee suffers an injury while on the job the cause of such injury must to some extent result from the negligence of the railroad."

Mr. DOUGLAS MCKAY: Must directly result.

The COURT: Must directly result from the negligence of the railroad. I charge you that.

Number 6, If you find that the place of injury was rendered unsafe because of the negligent, wilful or reckless act of a third party which the defendant could not have reasonably forseen or anticipated, then your verdict should be for the railroad. I charge you that.

Now, let's see if we can't simplify all that law I have charged you and talk to you in simple language. It may help you to understand what this is all about. I have charged you a whole lot of law and it's difficult for lawyers and judges sometimes to understand the law.

The first thing you should do when you get into the jury room is to decide was the defendant negligent. That is the first thing you should decide—was the defendant negligent? If you find that the defendant was not negligent, you stop right there. You don't have to go any further. You stop right there and write your verdict for the defendant.

If you find that the defendant was negligent, then you must go a step further and determine whether or not the negligence of the defendant was the proximate cause of the plaintiff's intestate's death and the injuries to the other plaintiffs. If you find the defendant's negligence was not the proximate cause of the plaintiff's intestate's death or the injuries to the other two plaintiffs, then you stop right there and write a verdict for the defendant.

If you find that the negligence of the defendant was the proximate cause of plaintiff's intestate's death and the injuries to the other two plaintiffs, then you would find for the plaintiffs and determine what amount of actual

damages they have suffered and write a verdict for the plaintiffs for that amount.

The main inquiry, as I have already charged you before in this case is did the defendant furnish the plaintiff's intestate and the other two plaintiffs a reasonably safe place to work. Did they use reasonable care to furnish them a safe place to work, remembering however, at the same time, as I have already charged you, that the defendant is not an insurer of plaintiffs' safety. In other words, the railroad company doesn't guarantee absolute safety but they are required to use reasonable care and to furnish a reasonably safe place for the plaintiffs to work.

Now, if they did furnish the plaintiffs a reasonably safe place to work in your opinion, under the law in these cases as I have given it to you, you write a verdict for the defendant. If they did not, your verdict should be for the plaintiff's intestate and the other plaintiffs.

Now, the form of your verdicts. You will write three different verdicts. If you find for the plaintiff in all three cases, you say we find for the plaintiff so many dollars, writing it out in words and figures on each case, on the back of each summons and complaint—"We find for the plaintiff." You don't have to name him; just take his case. I will give you the summons and complaint in each case, Mr. Foreman. You can write on the verdict, we find for the plaintiff so many dollars. Write it out in words and figures and sign your name as foreman on all three of them. If you find for the defendant, you simply write on the back "We find for the defendant" in all three cases and sign your name as Foreman. Now, if there will be any other exceptions, I will excuse the jury in the meantime to hear the exceptions. Any by the plaintiff?

Mr. EDENS: We have one suggestion, Your Honor.

Mr. DOUGLAS MCKAY: None, Your Honor.

The COURT: Well, you gentlemen go out and I will hear it.

Mr. EDENS: Well, no, Your Honor, we are not excepting to the charge.

The COURT: Well, come back then, Gentlemen. Now, on the back of each one of these complaints—they are folded

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like that—on the back of each case you will see the title written. You see, Mr. Foreman? You write your verdict right here on the back of that, right on the back of it. That is on that one, and on the back of this one likewise. You take the complaints and the answers, and you are entitled to all exhibits. You have to write three verdicts, you understand. Any questions the jury want to ask? (Pause and no answer) All right. Take the record and find a verdict.

(The jury retired for deliberation about 10:25 A.M. and returned with the verdicts at 12:28 P.M., which verdicts were published by the Clerk.)

DEPOSITIONS OF HENRY GIBBS, JOHN WASHINGTON, JIM GREEN, HERMAN MILLER AND CLINTON WRIGHT

Pursuant to the attached notice and in accordance with Federal Rules of Civil Procedure, the following depositions were taken before Marguerite S. Kinard, a Notary Public in and for the State of South Carolina at 2:30 o'clock P. M., on September 16, 1953, in the Colleton County Court room of the Colleton County Court House, Walterboro, S. C.

Appearances:

Messrs. Henry H. Edens and Jas. P. Harrelson, Attorneys for the Plaintiffs;

Messrs. Douglas McKay and I. A. Smoak, Jr., Attorneys for the Defendant.

It is stipulated between Counsel for the Plaintiff and Counsel for the Defendant, that the testimony to be presented shall be subject to introduction in each of the cases, namely: Charles Bright, Civil Action No. 3733; Eva Mitchell, Administratrix, Civil Action No. 3732; and Leroy Small, Civil Action No. 3734.

(The witnesses were duly sworn and cautioned to tell the truth, the whole truth and nothing but the truth and the depositions were taken by oral examination.)

Mr. Edens Calls Henry Gibbs who deposes and says as follows:

Q. Your name is Henry Gabe?
A. Henry Gibbs.
Q. How you spell it?
A. Gibbs.
Q. Where are you from Henry?
A. Osborn—Parker's Ferry supposed to be.
Q. Parker's Ferry?
A. Yes, sir.
Q. Where were you born?
A. Parker's Ferry.
Q. That is how far from Charleston?
A. 31 miles supposed to be to Charleston.
Q. Between Jacksonboro and Charleston?
A. That is right.
Q. You were working for the Railroad or the Coast Line on March 28th of this year?
A. Yes, sir.
Q. How long have you been working for them?
A. 14th day of January coming eight years.
Q. You work on some section gang?
A. Yes, sir.
Q. Who is your section master?
A. Mr. Harry Mitchell.
Q. Mitchell or Mitchum?
A. Mitchum.
Q. Were you present at the crossing at Jacksonboro on the morning these boys got hit?
A. Yes sir I was there.
Q. Why did you happen to be there?
A. Safety meeting at Florence and we were asked to go if we wished to go.
Q. They asked you to go up there?
A. Yes, sir.
Q. How many from your gang was there?
A. Six of us in our gang.
Q. How many on your gang?
A. Seven.
Q. What happened to the other fellow?

A. He didn't care to go.
Q. He didn't what?
A. Didn't care to go.
Q. How do you know?
A. Must have, didn't go.
Q. You don't know why he didn't go?
A. No sir I don't know why.
Q. Why did all of you congregate around the crossing?
A. Met right at the crossing for it wasn't far and we could get up to the train, and we just met there one after another. We were all in the clear from cars where we were.
Q. You were all meeting there waiting on the train?
A. Wouldn't be far to go why we meet up there.
Q. What were you waiting on?
A. As the boys come up, all talking and we all meet up at the same place.
Q. All got to the crossing at the same time and you got bogged down at the crossing?
A. Just one after another—in the clear from a car.
Q. Standing on the railroad right of way?
A. Yes sir standing on the railroad right of way.
Q. These other fellows were waiting on the same thing you were waiting on?
A. Yes, sir.
Q. All these fellows that got hurt were waiting on the same train you were waiting on?
That is right.
Q. As far as you know?
A. Yes, sir.
Q. Had you ever been around that station when a passenger train stopped?
A. No sir, so long, way back there, don't remember.
Q. Not a regular station there?
A. Use to be.
Q. Wasn't on the 28th of March, 1953 a regular station?
A. Well I think a flag station—flag a train it will stop.
Q. Those passenger trains don't stop there unless you flag them?
A. When you flag them they stop.

Q. If you flag them, you can stop one?

A. Runs twice a day and if you go out there in the morning and flag the train there, stop for anybody, women or men.

Q. If I wanted to ride the train I would have to get there and flag her down?

A. That the idea.

Q. Would you know where the train was going to stop if you flagged it?

A. Not positive.

Q. How far was the crossing from the station?

A. Near as I could get at, station and crossing should be about 150 feet or something.

Q. About 150 feet?

A. I believe as near as I can get at.

Q. Did you know whether the car you were going to get on would stop at the station or at the crossing?

A. Didn't know positive where it would stop at.

Q. It was just as likely to stop at the crossing as at the station?

A. If it did would have to walk.

Q. Just as apt to stop at the crossing as at the station?

A. Don't think so, don't believe it if you flag at the right place it is 150 feet.

Q. Why would you think it would stop at the station instead of at the crossing?

A. Were supposed to stop at the station.

Q. You mean the engine would just go right on by the station?

A. Engine have to pass the station for the coach to come by.

Q. If the coach hangs on the tail end of the engine, as the engine goes by the coach will trail the engine?

A. Yes, sir, if does like that it does.

Q. You ever ride on the train?

A. No, sir, not that train.

Q. Any train?

A. Yes sir been a long time since I ride a train.

Q. The last time you ride a train did it stop in the station or did you have to walk some?

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A. Have to walk some when the other trains stop.

Q. The train you rode on the last time, you had to walk to get to the station?

A. So long can't remember, been a long time since I ride a train.

Q. Ruling now that they stop at the station?

A. I don't know.

Q. The way they run at Jacksonboro, how do they stop that train—do they block that crossing?

A. If the length of the train it would.

Q. It usually blocks the crossing?

(Douglas McKay—I object to this question. The witness lives near Adams Run, and unless he knows of his own knowledge I object.)

Q. Do you know whether it blocks that crossing?

A. I don't know.

Q. How did you know where it was going to stop that morning?

A. Didn't know. We were out there waiting, where it would stop didn't know.

By Mr. DOUGLAS MCKAY:

Q. Just one question Henry, that is a level track along there and I think you could see the engine light some long distance?

A. Yes, sir, see the engine lights.

Q. Good many miles?

A. Yes, sir.

Q. And where you stopped was not far from the station?

A. Where we were not far.

Mr. Edens calls John Washington who deposes and says as follows:

Q. John you live in Jacksonboro?

A. Yes, sir.

Q. Have you been working for the Coast Line and for how many years?

A. Back and forth good bit, I forgot how many years.

Q. For several years before last March?

A. Oh yeah.

Q. And you work on a section gang under a section boss?

A. You mean now.

Q. On March 28, 1953, who was your section master?

A. Capt. Hill.

Q. Mr. Hill here?

A. Yes sir.

Q. Were you there that morning these boys got hurt?

A. Yes sir I was there.

Q. Did Mr. Hill tell you where the car was going to stop that you were to ride on to Florence to a safety meeting?

A. Where supposed to stop.

Q. Did he tell you where the car was going to stop that you were to ride on to Florence?

A. The spot.

Q. Did he say the train would stop at the crossing or at the station?

A. No, sir didn't tell.

Q. Didn't tell where?

A. No, sir.

Q. Did you know where it would stop?

A. No sir didn't know the spot.

Q. Didn't know whether the train would stop at the crossing or at the station, that is right?

A. Yes sir.

Q. That is a correct statement?

A. Yes sir.

Q. Just as apt to stop at the crossing as between the crossing and the station, that is correct, isn't it?

A. Suppose it would be.

Q. That is so?

A. I don't know which spot to stop.

Q. Just as apt to stop at the crossing?

A. Don't know whether it would stop at the crossing or not.

Q. Don't know whether it would stop at he crossing or not?

A. Supposed to stop at the depot.

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Q. And you live in Jacksonboro?

A. Yes, sir.

Q. When a train is stopped there, doesn't it generally block that crossing?

A. The highway and train track.

Q. I am talking about where the car came across and hit those people that morning, doesn't the train block that crossing when headed North?

A. It should be.

Q. Blocks that crossing?

A. If it run, it would block it.

Q. It blocks it and your answer is yes?

A. When running.

Q. When running North and it stops at Jacksonboro it blocks that crossing?

A. I guess it do.

Q. You live there, you know it does?

A. I see them stop sometime.

Q. What did you say?

A. Stop it sometime.

Q. Stop it, you mean it block that crossing?

A. I guess so.

Q. Did you understand this to be a free trip to Florence and back?

A. What?

Q. Don't you understand me, when I talk to you?

A. I understand now what you say. Ain't heard what you say then, hard of hearing.

Q. Did you understand that you were going to get a free trip to Florence and back by the Railroad?

A. Yes, sir.

Q. You understood that you were going to a safety meeting when you got there?

A. Oh yes.

Q. And you understood you were expected to go?

A. Oh yes shore.

By Mr. DOUGLAS MCKAY:

Q. You didn't have to go, did you John?

A. No sir not if you didn't want to.

By Mr. H. H. EDENS:

Q. You just said you understood that you were expected to go?

A. Yes expecting to go if felt like it.

Q. What you say?

A. I guess act of myself, go if I want to, go if you feel like it.

Q. All felt like going and Mr. Hill asked you to go?

A. I did feel like I would go.

Q. When did you get off from work on Friday?

A. Four o'clock sir.

Q. When did you get up that morning?

A. Around two o'clock, you talk about that same morning.

Q. Yes.

A. Two o'clock.

Mr. Edens calls Jim Green who deposes and says as follows:

Q. Jim, do you hear pretty good?

A. Yes sir I think so.

Q. You work for the Coast Line for how many years?

A. About 23 years I reckon.

Q. And you work under Mr. Hill over there?

A. Yes sir.

Q. Did Mr. Hill tell you where the car was going to stop that morning that was going to pick you up and ride you to the safety meeting in Florence?

A. Did he tell me?

Q. Yes.

A. Didn't tell me where it stop at.

Q. Did you know where it was going to stop it?

A. Did I know where it going to stop at no sir.

Q. Was anbody shooting crap at the crossing when you boys got hurt?

A. No sir.

Q. What were you doing up there?

A. Couldn't tell what doing up there.

Q. Doing anything but standing on their hind legs, waiting and talking?

A. What doing on his legs?

Q. Doing anything besides standing on his hind legs?

A. Don't know whether hind legs or front ones, know we were standing up there.

Q. Standing on the railroad right of way?

A. Yes sir.

Q. Crossing there?

A. Yes sir crossing there.

Q. Standing around the crossing?

A. Standing right by the crossing.

Q. On the railroad right of way?

A. Yes sir.

Q. And that is where everybody was standing waiting on the train?

A. Couldn't tell whether everybody—I wasn't there.

Q. Where were you?

A. Off from the railroad.

Q. I asked you where were you—I am asking where you were?

A. On the crossing board on the east side of the railroad.

Q. And how far from the crossing were you from where these boys got hit?

A. I don't know exactly now.

Q. As far as the back door of the court room back there?

A. I don't know exactly how far.

Q. Were you half way between the crossing and the station?

A. Where I was at.

Q. Yes sir where you were at?

A. Where I was at—I was off from the station.

Q. You were on the other side of the crossing from the station?

A. On the North side of the crossing from the station.

Q. Were you between the station and the crossing where these people got hit?

A. I was the other side of the crossing from where the boys got hit.

Q. You were beyond the station from where the boys got hit?

A. Yes sir.

Q. What were you doing down there?

A. Waiting on the train.

A. Yes sir I was North of the Station.

Station?

A. Yes sir that is it.

Q. North of the Station?

A. Yes sir.

Q. And you were North of the Station?

A. Yes sir I was North of the Station.

Q. All right the crossing was between you and the station?

A. Yes sir that is it.

Q. What were you doing down there waiting on the train?

A. What I doing?

Q. Yes?

A. Whein I heard the train blow I would walk on up to the station.

Q. Didn't you want to get on the train?

A. Did I want to get on the train, yes sir I was going to get on the train.

Q. Did you know where the train was going to stop?

A. Where it was going to stop?

Q. You understand that, did you know?

A. I know it was going to stop.

Q. You know where?

A. I didn't know where I tell you just now. I did know I was going to ride on the train, that is what I told you.

Q. That is what I am sure is the truth?

A. That is the truth.

Q. But until the cars stopped you didn't know where you would have to go to get on the train?

A. Before he stopped.

Q. After it stopped?

A. I told you just now when the train stopped I would go to it and when the conductor get off the train first I would go there and then the passenger gets on. I goes to the coach where the conductor gets off.

Q. I understand what you were doing way up there beyond the crossing, you thought the coach might stop down there?

A. What I doing there—I figure a free world and a person go where he want to.

Q. You mad with anybody you didn't want to be around?

A. Not mad with a one.

Q. Down there by yourself or somebody with you?

A. Where I was I was by myself.

Q. Was it dark up there around the station and you were afraid to go up there in the dark—nothing down there any worse than you are?

A. I don't think so.

Q. Do you live North of the station or South of the station?

A. North of the station or South of the station—let me see were I live at. I believe I live this way—I don't know.

Q. Do you live toward Walterboro from the station?

A. Back the other way—toward Hope Plantation.

Q. How did you go down to the railroad track—did you ride or walk?

A. I walked.

Q. And you had been out there how long before these boys had got hit?

A. Been there how long—about ten minutes—not very long—just got up there.

Q. You weren't waiting on anything but a train?

A. At the crossing.

Q. Down there at the crossing and not waiting on anything but a train?

A. When I would see the light, I would go where the crossing was.

Q. If you hadn't you would have got left?

A. Yes, sir, got left—waiting anywhere I thought.

Mr. DOUGLAS MCKAY: No questions.

Mr. Edens calls **Herman Miller** who deposes and says as follows:

Q. You have worked for the railroad or the Coast Line for how long, Herman?

A. 3 yrs. about the 3rd of August coming.

Q. You work on a section gang?

A. Yes, sir.

Q. Your section master is Mr. Hill sitting right back there behind?

A. Yes, sir.

Q. Did Mr. Hill tell you where the cars were going to stop for you to get on that morning to go to Florence?

A. No, sir.

Q. Did you know whether it was going to stop at the crossing or where?

A. No, sir, I did not, sir.

Q. And you were there when these boys got hit?

A. Yes, sir, right there pretty close to the crossing.

Q. What?

A. Pretty close to the crossing.

Q. Where were you when Mr. Hill invited you to go to the safety meeting in Florence?

A. I was at the motor car house where he told us.

Q. Where is the motor car house?

A. That is South of the depot station or we call it.

Q. How long before hand had Mr. Hill asked you to go? there and these boys that got hurt before Mr. Hill had asked you to go?

A. I didn't understand that question.

Q. How long before hand had Mr. Hill asked you to go?

A. Two or three days or maybe four days.

Q. Several days before you were to go, that you were invited to go?

A. Yes, sir.

Q. And you told him you would love to go?

A. Yes, sir.

Q. And you understood that you were to get free transportation and a free meal?

A. Yes, sir.

Q. And they wanted you to go?

A. Well, yes, sir, I guess they wanted us to go, ask us to go.

Q. The way you understood it?

A. Yes, sir.

Q. And Mr. Hill let you understand that he wanted you to go?

A. Said of we wanted to go.

Q. Now what did he say?

A. He said we all were invited to a safety meeting in Florence if you men want to go.

Q. If you men want to go?

A. Yes, sir, believe that is it as well as I can remember.

Q. And you understood he wanted you to go?

A. Yes, sir, after he told us.

Q. Mr. Hill has talked to you about this matter?

A. About this safety meeting.

Q. About these boys getting hit?

A. No one at all.

Q. Has anybody interviewed you about it at all?

A. No, sir.

Q. Never talked to Mr. Hill about it?

A. No, sir.

Q. Never talked to Mr. Ogier over here about it?

A. No, sir.

Q. Never saw him before?

A. Yes, sir.

Q. Where?

A. Jacksonboro, speaking to some of the men.

Q. When was that?

A. I can't remember the date to save my life.

Q. How long ago was it?

A. I think it was in May or June, best I can remember.

Q. You didn't give anybody a statement about this thing?

A. No, sir.

Q. Were you informed of any other way you could get to the safety meeting in Florence without being at Jacksonboro that morning?

A. No, sir.

By Mr. DOUGLAS MCKAY:

Q. Herman, you like to ride on the train?

A. Yes, sir, when I have anywhere to go.

Q. And particularly if it is free?

A. Well, yes, sir.

Q. Had you ever been to Florence?

A. No, sir, been through Florence.

Q. Never stopped there?

A. No, sir.

By Mr. H. H. EDENS:

Q. Are you so crazy about riding on a train that you would get up at two o'clock in the morning just to ride on the train?

A. No, sir, nothing special about riding a train that much.

Mr. Edens calls **Clinton Wright** who deposes and says as follows:

Q. Clinton, you were at the crossing on the morning that the boys were hit on March 28th of this year?

A. Yes, sir.

Q. Where were you going or what were you doing there?

A. Supposed to go to Florence.

Q. Going to Florence for what?

A. Safety meeting.

Q. When did you have to get up in order to be there?

A. Didn't even go to bed. I stayed up practically all night long going from one joint to another until I came to Jacksonboro.

Q. You were that crazy about riding on a train that you stayed up all night long?

A. No, sir, not the idea. I had just wanted to go and I thought if I went to bed I would over sleep so I just stayed up.

Q. And you were at the crossing when the boys got hit?

A. Yes, sir.

Q. You were waiting on the train to come pick you up?

A. Waiting on the train.

Q. Did you know where the car was going to stop that would ride you to Florence?

A. Supposed to be the depot, didn't know definitely—going where it stopped.

Q. Just hoped it would stop near where you were standing?

A. Didn't matter anywhere, I would went to it.

Q. You didn't have nothing else to do and you stopped nearest to where you thought it was going to stop?

A. Everybody else there and I stopped too.

Q. Did everybody seem to think it would stop at the crossing?

A. I don't know.

Q. Is that correct?

A. I don't know they were there.

Q. There waiting on the train?

A. They were there.

Q. Who was your section foreman?

A. Mitchum.

Q. Where was he?

A. I don't know he was supposed to go somewhere else to catch the train or drive his car, he wasn't at Jacksonboro.

Q. Were you told any other way you had to get to Florence except catch the train at Jacksonboro?

A. Catch it at Jacksonboro, what they told us.

Mr. DOUGLAS MCKAY: No questions.

(Certificate of Notary Public before whom foregoing depositions were taken omitted.)

United States Court of Appeal

FOR THE FOURTH CIRCUIT

No. 6813

ATLANTIC COAST LINE RAILROAD COMPANY,
APPELLANT,

versus

LEROY SMALLS, CHARLES BRIGHT, AND EVA G. MITCHEL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN MITCHEL, DECEASED, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

(Argued October 6, 1954 Decided November 8, 1954.)

Before PARKER, Chief Judge, DOBIE, Circuit Judge, and HOFFMAN, District Judge.

Douglas McKay (McKay & McKay on brief) for Appellant, and Henry H. Edens (Henry Hammer and James P. Harrelson on brief) for Appellees.

PARKER, Chief Judge:

This is an appeal from judgments for plaintiffs in three actions to recover damages from the Atlantic Coast Line Railroad Company under the Federal Employer's Liability Act. The three cases were consolidated in the court below

and heard before a jury, which returned verdicts for $1,500 and $2,000 in two cases involving personal injuries and a verdict for $4,166 in one involving the death of the injured person. The case arose out of injuries inflicted upon employees of the railroad company by an automobile with which the company had no connection, while they were standing at a crossing at Jacksonboro, S. C., waiting to be picked up by one of the company's passenger trains to be carried to Florence, S. C., where they were to attend a safety meeting which the company was holding for its employees. The case was submitted to the jury on the theory that the employees were protected by the Federal Employer's Liability Act while on their way to attend the meeting and that there was evidence in support of the contention of plaintiffs that the company was guilty of negligence in failing to provide them a safe place to work in that it had not lighted the crossing at which they were standing.

There is evidence that the company was holding a safety meeting for its employees at Florence on Saturday March 28, 1953, which the employees here were invited but not required to attend, and at which various matters affecting the safety of work were to be discussed. The employees, who were track repairers or "section hands", were not required to work on Saturdays but were requested by the company to attend this meeting. They were not paid for the time spent in attendance, but the company furnished them free transportation to attend and provided them food while there. The section hands in the vicinity of Jacksonboro were told that one of the company's fast trains would stop for them there around four o'clock on Saturday morning and about fourteen of them were assembled there about a quarter of an hour before that time. They were standing on the crossing where the state highway crosses the railroad tracks, when an automobile driven by one Cobb, who was not employed by nor in any way connected with the company, ran into them and inflicted the injuries, resulting in the death of one of them, for which the actions for damages are brought. The crossing at which they were standing was about 200 yards distant from the station at Jacksonboro and there were no lights either at the station

or at the crossing. The train which was to pick them up was not scheduled to stop at Jacksonboro, which was a mere flag station, but was ordered to stop there on the morning in question so that they might board it and go to Florence to attend the safety meeting.

On the facts, we think that the court below was correct in holding that the employees on their way to attend the safety meeting were covered by the provisions of the Federal Employer's Liability Act. They were attending the meeting as employees of the company and at its request for purposes connected with their employment in interstate commerce. We think that this was sufficient to bring them within the coverage of the act. *Healy v. Penn. R. Co.*, 3 Cir. 184 F. (2d) 209, certiorari denied, 340 U. S. 935, rehearing denied, 341 U. S. 912; *Mostyn v. Delaware, L. & W. R. Co.*, 2 Cir. 160 F. (2d) 15, certiorari denied, 332 U. S. 770. And see also *Thompson v. Eargle*, 4 Cir. 182 F. (2d) 717.

We do not think, however, that there is any evidence of negligence on the part of the company to sustain a recovery by plaintiffs. It appears that the crossing at which the employees had congregated was 200 yards distant from the station. They were not ordered or invited by the company to stand in the highway at the crossing, and we know of no principle upon which the company could be held guilty of negligence in not lighting it. Their injuries resulted, not from any negligence of the company, but from their own negligence or the negligence of a third person, for whose acts the company was in no way responsible. Plaintiffs rely upon the decision in *Lillie v. Thompson*, 332 U. S. 459, where a woman employee was assigned to night work in a dangerous locality where she was likely to suffer injury from the criminal acts of persons who were not employees, but that case manifestly has no application here.

As the defendant was entitled for the reasons stated to a directed verdict and to the judgments *non obstante veredicto* for which it moved, the judgments appealed from will be reversed and the case will be remanded with direction to enter judgments for the defendant.

Reversed.